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This issue contains:

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE

NOTICE

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U.S. Customs Service

General Notices

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, DC, August 8, 2001.

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,
Assistant Commissioner,
Office of Regulations and Rulings.

PROPOSED MODIFICATION OF RULING LETTER RELATING TO TARIFF CLASSIFICATION OF KEYBOARDS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed modification of ruling letter relating to tariff classification of keyboards.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, as amended, (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of keyboards under the Harmonized Tariff Schedule of the United States ("HTSUS"). No change is proposed with respect to the actual classification of the merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before September 21, 2001

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, General Classification Branch, (202) 927–2388.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "informed compliance" and "shared responsibility." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(1)), this notice advises interested parties that Customs intends to modify a ruling letter pertaining to the tariff classification of keyboards. Although in this notice Customs is specifically referring to one ruling (HQ 961259), this notice covers any rulings on the specific issue described below which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing data bases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the specific issue which is the subject to this notice should advise Customs during this notice period.

Customs modification herein relates only to the extent that certain language in HQ 961259 dated December 8, 1998, set forth as Attachment A, no longer reflects Customs view of Note 5 to Chapter 84, HTSUS. There is no change in the classification determinations in HQ 961259. Proposed HQ 963280, set forth as Attachment B, states our view with respect to Note 5(B) to Chapter 84, HTSUS.

Dated: August 1, 2001.

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, December 8, 1998.
CLA–2 RR:CR:GC 961259 DWS
Category: Classification
Tariff No. 8471.92.20 and 8471.60.20

MR. ROBERT E. BURKE
BARNES, RICHARDSON & COLBURN
200 East Randolph Drive, Suite 7920
Chicago, IL 60601

Re: Reconsideration of HQ 957491; PC-POS Keyboard with MSR.

DEAR MR. BURKE:

This is in response to your letter dated December 5, 1997, to the Port Director of Customs, Chicago, Illinois, on behalf of Preh Electronics, Inc., requesting reconsideration of HQ 957491, dated July 31, 1996, specifically concerning the classification of the personal computer (PC)—point-of-sale (POS) keyboard with a magnetic stripe reader (MSR) under the Harmonized Tariff Schedule of the United States (HTSUS). Your letter was referred to this office for a response.

Pursuant to 625(c)(1), Tariff Act of 1930 [19 U.S.C. §1625(c)(1)], as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act, Pub.L. 103–82, 107 Stat. 2057, 2186 (1993), notice of the proposed modification of HQ 957491 was published on November 4, 1998, in the CUSTOMS BULLETIN, Volume 32, Number 44. No comments were received in response to the notice.

Facts:

The PC-POS keyboard with MSR (referred to as "Sample C3" in HQ 957491) is a QWERTY-style keyboard with housing and interface electronics containing a slot for the MSR. It also consists of additional "rows and columns" keys which may be programmed to accommodate a customer's unique specifications, such as POS applications. You state that the keyboard is specifically designed for use with IBM or IBM-compatible PCs. The keyboard also includes an additional "wedge", which extends the flexibility of both the keyboard and a PC using the keyboard to various other external applications, such as laser scanners.

Issue:

Whether the PC-POS keyboard with MSR is classifiable under subheadings 8471.92.20 (1994) and 8471.60.20 (1998), HTSUS, as a keyboard, or under subheading 8537.10.90, HTSUS (1994 and 1998), as an other board for electric control or the distribution of electricity.

Law and Analysis:

Classification of merchandise under the HTSUS is in accordance with the General Rules of Interpretation (GRI's). GRI 1 provides that classification is determined according to the terms of the headings and any relative section or chapter notes.

Because HQ 957491 dealt with the classification of the keyboard entered both before (1994) and after amendments to chapter 84, note 5, HTSUS, were implemented in 1996, we will provide the proper classification of the keyboard for 1994 as well as under the current tariff schedule.

1994

The HTSUS provisions under consideration are as follows:

8471	Automatic data processing machines and units thereof; * * *:
	Other:
8471.92	Input or output units, whether or not entered with the rest of a system and whether or not containing storage units in the same housing:
	Other:
8471.92.20	Keyboards.
	Other:
	Other:

8471.92.88	Other.
* * * * * * *	
8537	Boards, panels (including numerical control panels), consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, other than switching apparatus of heading 8517:
8537.10	For a voltage not exceeding 1,000 V:
8537.10.90	Other.
* * * * * * *	

In part, chapter 84, note 5, HTSUS, states:

(A) * * *

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separately housed units. A unit is to be regarded as being a part of the complete system if it meets all of the following conditions:

(a) It is connectable to the central processing unit either directly or through one or more other units; and

(b) It is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system).

Such units entered separately are also to be classified in heading 8471.

Heading 8471 does not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings.

In HQ 957491, we held the subject keyboard to be classifiable in heading 8537, HTSUS, specifically under subheading 8537.10.90, HTSUS. In precluding classification of the keyboard in heading 8471, HTSUS, we stated that:

> Samples * * * C3 (the PC-POS) are not specifically designed as parts of ADP systems, are used with machines performing a specific function, and therefore, cannot be classified as ADP units. * * * Sample C3 has additional (programmable) rows and columns keys and a magnetic stripe reader that makes it particularly suitable for POS applications. It also includes an additional "wedge," which provides the capability to connect different peripherals, such as a laser scanner. These samples cannot, according to note 5, be classified as units for ADP machines under heading 8471, HTSUS (1994). See, e.g., HQ 955868, dated May 20, 1994 (wherein a POS terminal incorporating an ADP machine was classified as a cash register under heading 8470, HTSUS); HQ 087513, dated November 5, 1990 (wherein a laser machinery center with a "computer numerical control" (CNC) was classified as a laser machine tool under heading 8456, HTSUS).

You state that the keyboard connects directly to the central processing unit (CPU) of an IBM or IBM-compatible PC, and can function only when connected to an operating PC. Also, the keyboard relays data to and receives information from the PC. When the PC user depresses a key on the keyboard, the keyboard sends a signal to the CPU; this signal is then interpreted and used by the PC according to the automatic data processing (ADP) application utilized by the system user. Based upon this information, we now agree that the subject keyboard meets the terms of chapter 84, note 5(B), HTSUS, and is described as an ADP unit in heading 8471, HTSUS, specifically under subheading 8471.92.20, HTSUS.

HQs 955868 and 987513 are cited in HQ 957491 as precedent for the exclusion of the keyboard from classification in heading 8471, HTSUS. However, both of those rulings dealt with the classification of machines (POS terminal and laser machinery center) incorporating computer-type devices. It is now our position that these rulings are therefore distinguishable from the present situation concerning the classification of a keyboard which is, in its condition as imported, specifically designed for use with a PC, regardless of the end use of the PC.

We also agree that the keyboard meets the terms of heading 8537, HTSUS, which is broad in coverage. The keyboard is a board, containing switches of heading 8536, HTSUS, for electric control or the distribution of electricity.

In part, GRI 3(a) states that:

> [t]he heading which provides the most specific description shall be preferred to headings providing a more general description * * *

It is our position that heading 8471, HTSUS, more specifically describes the keyboard then does heading 8537, HTSUS. The keyboard must meet the terms of heading 8471, HTSUS, and therefore chapter 84, note 5, HTSUS, to be deemed an ADP unit. We find that the language of heading 8537, HTSUS, is not as stringent a test. Therefore the subject keyboard is classifiable in heading 8471, HTSUS.

However, we must determine in which provision of heading 8471, HTSUS, the keyboard is classifiable. Keyboards are specifically classifiable under subheading 8471.92.20, HTSUS, and MSRs are classifiable under subheading 8471.92.88, HTSUS.

GRI 6 states that:

> [f]or legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, mutatis mutandis, to the above rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this rule, the relative section, chapter and subchapter notes also apply, unless the context otherwise requires.

Section XVI, note 3, HTSUS, states that:

> [u]nless the context otherwise requires, composite machines consisting of two or more machines fitted together to form a whole and other machines adapted for the purpose of performing two or more complementary or alternative functions are to be classified as if consisting only of that component or as being that machine which performs the principal function.

As the subject keyboard also contains a MSR component, it is our position that it is a composite machine. GRI 6 allows us to apply section XVI, note 3, HTSUS, the note which governs the classification of composite machines in section XVI, HTSUS, at the subheading level.

Based upon section XVI, note 3, HTSUS, the keyboard is to be classifiable as if consisting only of that component which performs the principal function. Therefore, we must determine whether the keyboard or the MSR functions of the keyboard constitute its principal function. Based upon the literature provided and the arguments presented, although the MSR is provided to enhance the capability of the keyboard, the principal function is that of the keyboard itself. The merchandise may be used with a PC without ever utilizing the MSR or "wedge" components. Therefore, the subject keyboard is classifiable under subheading 8471.92.20, HTSUS. *See* NY 872612, dated March 27, 1991.

1998

The HTSUS provisions under consideration are as follows:

8471		Automatic data processing machines and units thereof; * * *:
8471.60		Input or output units, whether or not containing storage units in the same housing:
		Other:
8471.60.20		Keyboards.
*	* * * * * * *	
8537		Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517:
8537.10		For a voltage not exceeding 1,000 V:
8537.10.90		Other.
*	* * * * * * *	

As was stated in HQ 957491, in 1996, chapter 84, note 5, HTSUS, was substantially modified. It now states:

> (A) * * *
>
> (B) [a]utomatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all the following conditions:
>
> (a) It is of a kind solely or principally used in an automatic data processing system;
>
> (b) It is connectable to the central processing unit either directly or through one or more other units; and

(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.

(C) Separately presented units of an automatic data processing machine are to be classified in heading 8471.

(D) Printers, keyboards, X–Y coordinate input devices and disk storage units which satisfy the conditions of paragraphs (B)(b) and (B)(c) above, are in all cases to be classified as units of heading 8471.

(E) Machines performing a specific function other than data processing and incorporating or working with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

In HQ 957491, we again held the subject keyboard to be classifiable in heading 8537, HTSUS, specifically under subheading 8537.10.90, HTSUS. In precluding classification of the keyboard in heading 8471, HTSUS, we stated that:

> [n]ote 5(D) must be read in light of note 5(E) to chapter 84, HTSUS. Note 5(B) to chapter 84, HTSUS, provides that a unit is to be regarded as being a part of an ADP system if it meets all the listed conditions, "subject to note 5(E) to chapter 84, HTSUS." Note 5(E), which prior to 1996 was found following notes 5(A) and 5(B) under note 5 (see above), provides that "[m]achines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings (addition to 1996 text in bold face)." Thus, while note 5(D) negates the sole or principal use requirement when considering the classification of printers, keyboards, X–Y coordinate input devices and disk storage units, note 5(E) provides a separate prerequisite to the classification of any ADP machine and, therefore, ADP unit. To be classified as an ADP unit, a device must be used with a machine that is considered, for classification purposes, an ADP machine. *See* chapter 84, note 5(A), HTSUS (1994/1996) (defining "automatic data processing machines" for purposes of heading 8471, HTSUS).
>
> * * * * * * *
>
> The classification of sample C3 (the PC-POS), in light of the 1996 amendments, is a more difficult determination. However, it is our opinion that sample C3, although it can be connected to a standard, desktop PC, cannot be classified as an ADP input unit under heading 8471, HTSUS. Although "principal use" is not required, some degree of "capacity" for use with an ADP machine, in light of the purpose of the 1996 amendments, must be required. To be "capable" of being used with an ADP machine, a device must be actually, practically and commercially fit for such use. Such "capacity" requires more than a casual, incidental, exceptional or possible use.
>
> Sample C3 has additional (programmable) rows and columns keys and a magnetic stripe reader that makes it particularly suitable for POS applications. It also includes an additional "wedge," which provides the capability to connect different peripherals, such as a laser scanner. Because of its special design, sample C3 costs a great deal more than a "standard" desktop keyboard (approximately ten times more than the "standard" keyboard). Moreover, sample C3 provides certain features (i.e., many programmable function keys; "wedge") that would not be used if connected to a standard, desktop PC. Thus, while sample C3 can be connected to a standard, desktop PC, it is highly unlikely that one would purchase it for such use, as it is not practically and commercially fit for such use. While counsel for Preh has provided pictures of sample C3 connected to a standard, desktop PC, it is our opinion that any such use would be merely "casual, incidental, exceptional or possible." This type of use was not the type contemplated by the amendments to chapter 84, note 5, HTSUS. Accordingly, sample C1 [sic], * * * is classifiable under subheading 8537.10.90, HTSUS.

It is our understanding that the 1996 addition of note (D) to chapter 84, note 5, HTSUS, was intended to be expansive, not restrictive. Indeed, as noted in HQ 957491, for merchandise to meet the terms of note (D), the product need not meet the "sole or principal use" test of chapter 84, note 5(B)(a), HTSUS. We now find that the "actually, practically and commercially fit for such use" test created in HQ 957491 is too strict. In utilizing such a test, it appears that an actual use requirement is substituted for the "sole or principal use" requirement of chapter 84, note 5(B)(a), HTSUS. Based upon information we have received, it is our understanding that such a restrictive substitution was not intended by the drafters of note (D).

The test for meeting the terms of note (D) should be what is specifically required in note (D). If certain devices satisfy the conditions of chapter 84, notes 5(B)(b) and (c), HTSUS,

they are to be classified as units of heading 8471, HTSUS. As we have previously stated, the subject keyboard is connectable to a CPU and it is able to accept or deliver data in a form which can be used by an ADP machine, thereby satisfying the terms of chapter 84, notes 5(B)(b) and (c), and note 5(D), HTSUS.

We will confine the application of chapter 84, note 5(E), HTSUS, to the subject merchandise. Based upon the information provided, and contrary to the holding in HQ 957491, the subject keyboard performs a data processing function, as its intended use is to input data. In fact, it is our understanding that a keyboard user can manually input the data from a credit card or other card into the PC by punching the keys of the keyboard rather than sliding the card through the MSR. Therefore, the MSR does not necessarily have to be utilized. Consequently, because the purpose of the keyboard is for data input, it is now our position that chapter 84, note 5(E), HTSUS, does not preclude classification of the keyboard in heading 8471, HTSUS. We also note that, as previously stated, MSRs themselves are classifiable in heading 8471, HTSUS.

As we have now determined that the keyboard is described in heading 8471, HTSUS, as an ADP unit, based upon our analysis of the classification of the keyboard under the 1994 HTSUS (same rules apply), it is our position that the keyboard is classifiable under subheading 8471.60.20, HTSUS. *See* NY 817753, dated January 4, 1996.

Holding:

The PC-POS keyboard with MSR is classifiable under subheadings 8471.92.20 (1994) and 8471.60.20 (1998), HTSUS, as a keyboard.

HQ 957491 is modified to reflect the reasoning herein. In accordance with 19 U.S.C. §1625(c)(1), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN. Publication of rulings or decisions pursuant to 19 U.S.C. §1625(c)(1) does not constitute a change of practice or position in accordance with section 177.10(c)(1), Customs regulations [19 C.F.R. §177.10(c)(1)].

MARVIN AMERNICK,
(for John Durant, Director,
Commercial Rulings Division.)

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:GC 963280 GOB
Category: Classification
Tariff No. 8471.60.20, 8537.10.90,
8538.90.80, 8485.90.00, and 8548.90.00

CAROLYN D. AMADON
ROBERT E. BURKE
BARNES, RICHARDSON & COLBURN
303 East Wacker Drive
Suite 1100
Chicago, IL 60601

Re: Keyboards; Keytops; HQ 961259 modified.

DEAR MS. AMADON AND MR. BURKE:

This letter is with respect to your letter of November 22, 1999, on behalf of Preh Electronics, Inc. ("Preh"), concerning the classification, under the Harmonized Tariff Schedule of the United States ("HTSUS"), of keyboards, keypads, and parts thereof. You made an additional submission dated August 29, 2000. We regret the delay in responding.

Facts:

In your submission of November 22, 1999, you "request a ruling on products similar to that covered by HQ 961259 (December 8, 1998) which modified HQ 957491 (July 31, 1996).

While HQ 961259 addressed one representative model of keyboard, the PC-POS, we believe the principles involved apply to all of Preh's imported products that have the same characteristics as the Preh PC-POS."

In HQ 961259, we held that the PC-POS keyboard with a magnetic stripe reader (MSR) is classified under subheading 8471.92.20, HTSUS (1994 "HTSUS") and 8471.60.20, HTSUS (1998 HTSUS), as a keyboard.

The merchandise at issue in HQ 961259 was described as follows in that ruling:

> The PC-POS keyboard with MSR * * * is a QWERTY-style keyboard with housing and interface electronics containing a slot for the MSR. It also consists of additional "rows and columns" keys which may be programmed to accommodate a customer's unique specifications, such as POS applications * * * the keyboard is specifically designed for use with IBM or IBM-compatible PCs. The keyboard also includes an additional "wedge," which extends the flexibility of both the keyboard and a PC using the keyboard to various other external applications, such as laser scanners.

In your November 22, 1999 submission, you describe the goods at issue in this request as follows:

> The first category of merchandise described herein includes Preh's MC and WX series completed keyboards * * * They are either "rows and columns" keyboards or, in some cases, "QWERTY-style" keyboards containing 84 or 128 keys, and like the Preh PC-POS keyboard that was the subject of HQ 961259 (December 8, 1998), both the MC and WX series are imported with housings and interface electronics. They are configured for data entry functions, and have applications in commercial office and POS settings. Like the Preh PC-POS, the MC and WX series cannot be operated unless connected to a CPU through the interface. In addition, they send and receive data from the ADP system, and are used with an ADP system in the same manner as the Preh PC-POS keyboard.
>
> Preh's second category of merchandise in question includes three types of unfinished computer keyboards [footnote omitted]: (1) "rows and columns" keypads, including the NW and the MTF series; (2) QWERTY-style reconfigurable keypads, including the AK series; and, (3) customized keypads and keyboards, in which the size, shape and layout are specified by Preh's customers. The bare keyboards and keypads are not imported with housings or interface electronics. However, they have the same basic design and function as the Preh PC-POS Keyboard with MSR that was described in HQ 961259, dated December 8, 1998. First, the keys consist of three-fourths inch keyspacing, which is consistent with the standard spacing of all computer keyboards. Second, they have identical actuation mechanisms. Third, the bare keyboards and keypads cannot be operated unless they are connected to a CPU through an interface. Fourth, after being equipped with interface electronics, the keyboards and keypads are able to send and receive data from the ADP system. Thus, once they are equipped with interface electronics, Preh's bare keyboards and keypads are used with an ADP system in the same manner as the Preh PC-POS keyboard that was the subject of HQ 961259.
>
> With respect to parts and accessories, the final category of merchandise described herein, Preh separately imports keytops for use with its keyboards. They are both printed and unprinted, and are interchangeable. They are specifically designed for use with the keyboards described herein.

You refer to the first category of merchandise, described above, as the Preh MC and WX series of completed keyboards. You break down the second category of merchandise, described above, into the following four groups: sample A1: rows and columns keyboards; sample A2: QWERTY-style keypad; sample A3: customized keyboards; and keytops separately imported by Preh.

Issue:

What is the tariff classification of the subject merchandise?

Law and Analysis:

Classification under the HTSUS is made in accordance with the General Rules of Interpretation ("GRI's"). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI's may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes ("EN's") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN's provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80.

The HTSUS provisions under consideration are as follows:

8471	Automatic data processing machines and units thereof; * * *:
8471.60	Input or output units, whether or not containing storage units in the same housing:
	Other:
8471.60.20	Keyboards.
* * * * * * *	
8537	Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity, including those incorporating instruments or apparatus of chapter 90, and numerical control apparatus, other than switching apparatus of heading 8517:
8537.10	For a voltage not exceeding 1,000 V:
8537.10.90	Other.
* * * * * * *	
8538	Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537:
8538.90	Other:
	Other:
8538.90.80	Other
* * * * * * *	
8485	Machinery parts, not containing electrical connectors, insulators, coils, contacts or other electrical features, and not specified or included elsewhere in this chapter:
8485.90.00	Other
* * * * * * *	
8548	* * * electrical parts of machinery or apparatus, not specified or included elsewhere in this chapter:
8548.90.00	Other
* * * * * * *	

You claim that the goods at issue here are classifiable under heading 8471, HTSUS. Heading 8471, HTSUS, is governed by the terms of Legal Note 5 to Chapter 84, HTSUS, which provides, in relevant part:

> (B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all the following conditions:
>
> (a) It is of a kind solely or principally used in an automatic data processing system;
>
> (b) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system.
>
> * * * * * * *
>
> (D) Printers, keyboards, X–Y coordinate input devices and disk storage units which satisfy the conditions of paragraphs (B)(b) and (B)(c) above, are in all cases to be classified as units of heading 8471.
>
> (E) Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

The General EN to Chapter 84, HTSUS, provides in pertinent part ((E) (1)) as follows:

> A machine incorporating an automatic data processing machine and performing a specific function other than data processing is classifiable in the heading corresponding to

the function of that machine or, in the absence of a specific heading, in a residual heading, and not in heading 84.71.

Note 2 to section XVI, HTSUS, provides in pertinent part as follows:

> Subject to note 1 to this section, note 1 to chapter 84 and to note 1 to chapter 85, parts of machines (not being parts of the articles of heading 8484, 8544, 8545, 8546 or 8547) are to be classified according to the following rules:
>
> (a) Parts which are goods included in any of the headings of chapters 84 and 85 (other than headings 8409, 8431, 8448, 8466, 8473, 8485, 8503, 8522, 8529, 8538 and 8548) are in all cases to be classified in their respective headings;
>
> (b) Other parts, if suitable for use solely or principally with a particular kind of machine, or with a number of machines of the same heading (including a machine of heading 8479 or 8543) are to be classified with the machines of that kind or in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate
>
> * * *
>
> (c) All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate, or failing that, in heading 8485 or 8548.

Preh MC and WX Series Completed Keyboards

In your August 29, 2000 submission you excerpt the following language from HQ 961259:

> The test for meeting the terms of note (D) should be what is specifically required in note (D). If certain devices satisfy the conditions of chapter 84, notes 5(B)(b) and (c), HTSUS, they are to be classified as units of heading 8471, HTSUS.

We are no longer of that opinion as expressed in HQ 961259. Note 5(D) to Chapter 84, HTSUS, is subject to Note 5(E). Accordingly, if a machine performs a specific function other than data processing and incorporates or works in conjunction with an automatic data processing machine, it is to be classified in the heading corresponding to the function of the machine, and not in heading 8471, HTSUS.

In HQ 957491, which was modified by HQ 961259 only as to the classification of the PC-POS, we stated:

> Thus, while note 5(D) negates the sole or principal use requirement when considering the classification of printers, keyboards, X–Y coordinate input devices and disk storage units, note 5(E) provides a separate prerequisite to the classification of any ADP machine and, therefore, ADP unit. To be classified as an ADP unit, a device must be used with a machine that is considered, for classification purposes, an ADP machine. *See* chapter 84, note 5(A), HTSUS (1994/1996) (defining "automatic data processing machines" for purposes of heading 8471, HTSUS).

In HQ 960081 dated February 12, 2001, we determined that a 3M Scotchprint Printer is classified in subheading 8443.59.50, HTSUS, based upon Note 5(E) to Chapter 84.

In HSC 25 in March 2000 (Annex H/6 to Doc. NC0250E2), the Harmonized System Committee ("HSC") of the World Customs Organization ("WCO") confirmed the classification of the "Iris 3047" ink-jet printer in heading 8443 and subheading 8443.51, rather than in heading 8471, by application of GRI 1 (Notes 5(B), 5(D) and 5(E) to Chapter 84). In essence, the HSC determined that the goods of Note 5 (D) to Chapter 84 are units of automatic data processing and therefore are subject to Note 5(E) of Chapter 84. See Note 5 (B) which contains the language "Subject to paragraph (E) below * * *" and Note 5 (D) which pertains to "* * * satisfy[ing] the conditions of paragraphs (B)(b) and (B)(c) * * *" As stated above, Note 5 (E) provides:

> Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in the headings appropriate to their respective functions or, failing that, in residual headings.

Classification opinions of the HSC may provide assistance in the understanding of the international agreement, the Harmonized System, on which the HTSUS is based. The HSC decision is consistent with our decision in HQ 960081 and here.

The Preh MC and WX series of completed keyboards are either "rows and columns" keyboards, or, in some cases, "QWERTY"-style keyboards which contain 84 or 128 keys. They are both imported with housings and all of the interface electronics. They are configured for data entry functions, and have applications in commercial office and POS settings. They are designed for connections to IBM-PC compatible types of computers, and are compatible with all common operating systems.

We find that the Preh MC and WX series of completed keyboards are described in heading 8471, HTSUS. They are not excluded from heading 8471 by Note 5(E) as they perform no function other than data processing.

Rows and Columns Keyboards (sample A1), QWERTY-style Keypads (sample A2), and Customized Keyboards (sample A3)

The rows and columns keyboards (sample A1), QWERTY-style keypads (sample A2), and customized keyboards (sample A3) are imported without their housings and interface electronics. They do not have the ability to accept or deliver data in a form (codes or signals) which can be used by an ADP system. See Legal Note 5(B)(c) to Chapter 84, HTSUS. There is no documentary evidence as to the principal function of these goods. Accordingly, we find that classification of these goods in heading 8471, HTSUS, is precluded. We find that they are described in heading 8537, HTSUS, and therefore classified in subheading 8537.10.90, HTSUS, as: "Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity * * *: For a voltage not exceeding 1,000 V: * * * Other."

Keytops Separately Imported by Preh

Printed keytops are classified in subheading 8538.90.80, HTSUS, as: "Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537: * * * Other: * * * Other: * * * Other."

Unprinted keytops cannot be classified pursuant to Legal Note 2 (b) to Section XVI, HTSUS, because satisfactory evidence has not been provided that the unprinted keytops are suitable for use solely or principally with a particular kind of machine, as required by that Note. Note 2(c) to Section XVI provides: "All other parts are to be classified in heading 8409, 8431, 8448, 8466, 8473, 8503, 8522, 8529 or 8538 as appropriate or, failing that, in heading 8485 or 8548." Pursuant to Note 2(c) to Section XVI, the unprinted or interchangeable keytops which do not contain electrical connectors are classified in subheading 8485.90.00, HTSUS, as: "Machinery parts, not containing electrical connectors, insulators, coils, contacts or other electrical features, and not specified or included elsewhere in this chapter: * * * Other." If there are keytops which include electrical connectors, they are classified in subheading 8548.90.00, HTSUS, as "* * * electrical parts of machinery or apparatus, not specified or included elsewhere in this chapter: * * * Other."

1994 HTSUS

HQ 961259 also dealt in part with the 1994 HTSUS. Note 5 of Chapter 84, HTSUS (1994), provided in pertinent part as follows:

> (B) Automatic data processing machines may be in the form of systems consisting of a variable number of separately housed units. A unit is to be regarded as being part of the complete system if it meets all of the following conditions:
>
> (a) It is connectable to the central processing unit either directly or through one or more other units; and
>
> (b) It is specifically designed as part of such a system (it must, in particular, unless it is a power supply unit, be able to accept or deliver data in a form (code or signals) which can be used by the system).
>
> Both units entered separately are also to be classified in heading 8471.
>
> Heading 8471 does not cover machines incorporating or working in conjunction with an automatic data processing machine and performing a specific function. Such machines are classified in the headings appropriate to their respective functions or, failing that, in residual headings.

We find that there would be no different result under the 1994 HTSUS from the above findings stated above for the 2001 HTSUS.

HQ 961259

HQ 961259 provided in pertinent part as follows:

> The test for meeting the terms of note (D) should be what is specifically required in note (D). If certain devices satisfy the conditions of chapter 84, notes 5(B)(b) and (c), HTSUS, they are to be classified as units of heading 8471, HTSUS. As we have previously stated, the subject keyboard is connectable to a CPU and it is able to accept or deliver data in a form which can be used by an ADP machine, thereby satisfying the terms of chapter 84, notes 5(B)(b) and (c), and note 5(D), HTSUS.
>
> We will confine the application of chapter 84, note 5(E), HTSUS, to the subject merchandise. Based upon the information provided, and contrary to the holding in HQ

957491, the subject keyboard performs a data processing function, as its intended use is to input data. In fact, it is our understanding that a keyboard user can manually input the data from a credit card or other card into the PC by punching the keys of the keyboard rather than sliding the card through the MSR. Therefore, the MSR does not necessarily have to be utilized. Consequently, because the purpose of the keyboard is for data input, it is now our position that chapter 84, note 5(E), HTSUS, does not preclude classification of the keyboard in heading 8471, HTSUS. We also note that, as previously stated, MSRs themselves are classifiable in heading 8471, HTSUS.

This language in HQ 961259 no longer reflects our view of Note 5 to Chapter 84, HTSUS. Our view is reflected in the language of HQ 957491 (more fully excerpted above), where we stated that "* * * note 5(E) provides a separate prerequisite for the classification of any ADP machine and, therefore, ADP unit." [Emphasis in original.] Our view is also reflected in the classification opinion with respect to the "Iris 3047" ink-jet printer, described above.

Holdings:

The Preh MC and WX series completed keyboards are classified in subheading 8471.60.20, HTSUS, as: "Automatic data processing machines and units thereof * * *; * * * Input or output units, whether or not containing storage units in the same housing: Other: Keyboards."

The rows and columns keyboards (sample A1), QWERTY-style Keypads (sample A2), and customized keyboards (sample A3) are classified in subheading 8537.10.90, HTSUS, as: "Boards, panels, consoles, desks, cabinets and other bases, equipped with two or more apparatus of heading 8535 or 8536, for electric control or the distribution of electricity * * *: For a voltage not exceeding 1,000 V: * * * Other."

The printed keytops separately imported by Preh are classified in subheading 8538.90.80, HTSUS, as: "Parts suitable for use solely or principally with the apparatus of heading 8535, 8536 or 8537: * * * Other: * * * Other: * * * Other."

The unprinted or interchangeable keytops which do not contain electrical connectors are classified in subheading 8485.90.00, HTSUS, as: "Machinery parts, not containing electrical connectors, insulators, coils, contacts or other electrical features, and not specified or included elsewhere in this chapter: * * * Other."

If there are unprinted or interchangeable keytops which include electrical connectors, they are classified in subheading 8548.90.00, HTSUS, as "* * * electrical parts of machinery or apparatus, not specified or included elsewhere in this chapter: * * * Other."

Effect on Other Rulings:

HQ 961259 is modified to the extent described above, i.e., the language in HQ 961259 no longer reflects our view of Note 5 to Chapter 84, HTSUS.

JOHN DURANT,
Director,
Commercial Rulings Division.

PROPOSED REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF WOVEN COTTON HANDKERCHIEFS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed revocation of a ruling letter and treatment relating to the classification of woven cotton handkerchiefs with decorative design in contrasting stitching.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs intends to revoke a ruling letter relating to the tariff classification of woven cotton handkerchiefs with decorative design in contrasting stitching under the Harmonized Tariff Schedule of the United States (HTSUS), and to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Comments are invited on the correctness of the proposed action.

DATE: Comments must be received on or before September 21, 2001.

ADDRESS: Written comments (preferably in triplicate) are to be addressed to U.S. Customs Service, Office of Regulations and Rulings, Attention: Regulations Branch, 1300 Pennsylvania Avenue N.W., Washington, D.C. 20229. Comments submitted may be inspected at the same address during regular business hours.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textile Branch, (202) 927–2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is

responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, this notice advises interested parties that Customs intends to revoke a ruling letter pertaining to the tariff classification of woven cotton handkerchiefs with decorative embroidery in contrasting stitching. Although in this notice, Customs is specifically referring to one ruling New York Ruling (NY) G83802 dated October 10, 2000, this notice covers any rulings on this merchandise which may exist but have not been specifically identified. Customs has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice, should advise Customs during this period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs intends to revoke any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States (HTSUS). Any person involved in substantially identical transactions should advise Customs during this notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable presumption of lack of reasonable care on the part of the importer or his agents for importations of merchandise subsequent to the effective date of the final notice.

In NY G82728, Customs ruled that the subject handkerchiefs, with decorative embroidery in contrasting stitching, were classified in subheading 6213.20.1000, HTSUSA, which provides for "Handkerchiefs: Of cotton: Hemmed, not containing lace or embroidery." This ruling letter is set forth as "Attachment A" to this document. Since the issuance of this ruling, Customs has reviewed the classification of these items and has determined that the cited ruling is in error. The subject handkerchiefs are "embroidered" within the meaning of the HTSUSA and are correctly classified in subheading 6213.20.2000, HTSUSA, which provides for "Handkerchiefs: Of cotton: Other." The general column one duty rate is 7.2 percent *ad valorem*. The textile category is 330.

Pursuant to 19 U.S.C. 1625(c)(1), Customs intends to revoke NY G82728 dated October 10, 2000, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pur-

suant to the analysis set forth in Proposed Headquarters Ruling Letter HQ 964618 (see "Attachment B" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs intends to revoke any treatment previously accorded by the Customs Service to substantially identical merchandise. Before taking this action, consideration will be given to any written comments timely received.

Dated: July 25, 2001.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT A]

DEPARTMENT OF THE TREASURY.
U.S. CUSTOMS SERVICE,
New York, NY, October 10, 2000.

CLA-2-62:RR:NC:3:353 G82728
Category: Classification
Tariff No. 6213.20.1000

MR. JOHN B. PELLEGRINI
ROSS & HARDIES
Park Avenue Tower
65 East 55th Street
New York, NY 10022-1000

Re: The tariff classification of handkerchiefs from China.

DEAR MR. PELLEGRINI:

In your letter dated September 20,2000, on behalf of I. Shalom & Company, Inc., you requested a classification ruling. The samples submitted with the ruling request will be returned per your request.

The submitted samples are Style Nos. 114C, 115C and 146X handkerchiefs constructed of woven 100% cotton fabric. Style No. 114C measures approximately 40 cm x 53 cm. The initial "T" along with abstract designs is embroidered in brown and tan thread; the embroidery dimensions are approximately 6 cm in length and 1 cm in height. Style No. 115C measures approximately 40 cm x 53 cm. The embroidery consists of an abstract design in brown and tan thread; the embroidery dimensions are approximately 5 cm in length and 8 mm in height. Style No. 146X measures approximately 40 cm square. The embroidery consists of one of 18 initials in a variety of thread colors; the embroidered initial measures approximately 22 mm X 18 mm.

You state that the embroidery is not "de minimis" and must be taken into account for classification purposes, and that the handkerchiefs should be classified as "containing lace or embroidery" in subheading 6213.20.2000. This office notes that the operative feature of embroidery is the ornamental characteristic of the stitching. The instant embroidery is negligible, and so limited in its extent as to not require that the handkerchiefs be considered as embroidered.

The applicable subheading for the Style Nos. 114C, 115C and 146X handkerchiefs will be 6213.20.1000, Harmonized tariff schedule of the United States (HTS), which provides for "Handkerchiefs: Of cotton: Hemmed, not containing lace or embroidery." The duty rate will be 13.5% ad valorem.

The Style Nos. 114C 115C and 146X handkerchiefs fall within textile category designation 330. Based upon international textile trade agreements products of China are subject to quota and the requirement of a visa.

The designated textile and apparel categories and their quota and visa status are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most currant information, we suggest that you check, close to the time of shipment, the *U.S. Customs Service Textile Status Report*, an internal issuance of the U.S. Customs Service, which is available at the Customs Web site at www.customs .gov. In addition, the requirements applicable to the subject merchandise may be affected and should also be verified at the time of shipment.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 212–637–7084.

ROBERT B. SWIERUPSKI,
Director,
National Commodity Specialist Division.

[ATTACHMENT B]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC.

CLA–2 RR:CR:TE 964618 ASM
Category: Classification
Tariff No. 6213.20.2000

JOHN B. PELLEGRINI, ESQ.
ROSS & HARDIES
Park Avenue Tower
65 East 55th Street
New York, NY 10022–3219

Re: Request for Administrative Review; Reconsideration and Revocation of NY G82728: Woven cotton handkerchiefs with decorative design in contrasting stitching.

DEAR MR. PELLEGRINI:

This is in response to your letter, dated October 23, 2000, on behalf of I. Shalom & Company, Inc., requesting reconsideration of Customs New York Ruling (NY) G82728, dated October 10, 2000, which classified woven cotton handkerchiefs with decorative designs in contrasting stitching under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed this ruling and determined that the classification provided for this merchandise is incorrect. This ruling revokes NY G82728 by providing the correct classification for the subject merchandise. Samples were submitted to this office for examination.

Facts:

The subject items are three hemmed woven 100 percent cotton handkerchiefs which are identified under separate style numbers. Style No. 114C is constructed of plain white woven fabric measuring approximately 40 cm by 53 cm. A single letter with decorative stitching on either side appears in contrasting color in the upper right quadrant and measures approximately 6 cm in length and 1 cm in height. Style No. 115C is constructed of plain white woven fabric measuring approximately 40 cm by 53 cm. There is no initial and the decorative stitching consists of abstract designs in contrasting color in the upper right quadrant measuring approximately 5 cm in length and approximately 8 mm in height. Style No. 146X is a white cotton square measuring 40 cm. The initial "M" is stitched in contrasting color at the lower left quadrant and measures approximately 22 mm by 18 mm. The letter elements on this handkerchief will vary with some monograms being only 5 mm in width.

In NY G82728, dated October 10, 2000, the subject handkerchiefs were classified in subheading 6213.20.1000, HTSUSA, which provides for "Handkerchiefs: Of cotton: Hemmed,

not containing lace or embroidery." You disagree with this classification and claim that the handkerchiefs should be classified under subheading 6213.20.2000, HTSUSA, as "Other" (embroidered).

Issue:

What is the proper classification for the merchandise?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Under the HTSUSA, Chapter 58 contains a definition of "embroidery" at Note 6, as follows:

> 6. In heading 5810, the expression "*embroidery*" means, *inter alia*, embroidery with metal or glass thread on a visible ground of textile fabric, and sewn applique work of sequins, beads or ornamental motifs of textile or other materials. * * *

The EN to heading 5810, further provides that the embroidery threads are usually of textiles, and that "Embroidery is obtained by working with embroidering threads on a pre-existing ground of * * * woven fabric, * * * in order to produce an ornamental effect on that ground."

Headquarters Ruling (HQ) 084964, dated September 19, 1989, cites Chapter 58, Note 6, and the EN to heading 5810 in determining that handkerchiefs embroidered with a triangle measuring 14 cm by 9 cm, in non-contrasting stitching, are properly classified in subheading 6213.20.1000, HTSUSA, which provides for "Handkerchiefs: of cotton: Hemmed, not containing lace or embroidery." In this ruling it was determined that the embroidery did not produce an ornamental effect and did not affect the classification of the merchandise since it failed to perform a commercial purpose. *See also* HQ 086860, dated November 9, 1990, which affirms the decision in HQ 084964, and cites to *United States v. Harden*, 68 Fed. 182, 15 C.C.A. 358, cert. denied, 163 U.S. 709 (1895) wherein the Court stated that "the embroidery of a single letter upon the corner of the handkerchief is so limited in its extent and of such comparative narrowness as not to require that the handkerchiefs should be regarded as embroidered."

In the subject case, all three styles have decorative stitching in a contrasting thread to the white cotton handkerchief. Furthermore, the designs are not sewn on a corner of the handkerchief but are clearly visible and intended to be marketed with the embroidery visible to the purchaser. In particular, the handkerchief identified as Style No. 146X bears a distinctive single letter monogram measuring approximately 22 mm by 18 mm. Therefore, it is not subject to *United States v. Harden (supra)* because the monogram is neither limited in its extent nor comparatively narrow in design.

It is also important to note that in defining the term "embroidery" under the HTSUSA, HQ 086860 (*supra)* cites to the case of *Baylis Brothers, Inc. v. United States*, 60 Cust. Ct. 336, C.D. 3383 (1968), aff'd., 416 F.2d 1383 (CCPA 1969) which involved the classification under the Tariff Schedules of the United States (predecessor of the HTSUSA), of smocked dress fronts. The *Baylis* case addressed whether or not the U.S. Customs Court was correct in holding that the definition of the term "embroidery" when used in the Tariff Act, ordinarily requires that for a thing to be embroidered, there must be an ornamental, superimposed stitching which is the result of needlework. In *Baylis* the U.S. Court of Customs and Patent Appeals affirmed the lower court's holding by finding that "* * * the operative feature of embroidery, for tariff purposes, is the ornamental characteristic of the stitching." In applying the *Baylis* decision to the merchandise which is now at issue, we find that the decorative designs appearing on each of the subject articles can be characterized as ornamental, superimposed stitching which is the result of needlework.

The EN to 6213, states that, pursuant to Chapter 62, Note 7, handkerchiefs in this heading cannot exceed 60 cm in length. The subject handkerchiefs are each less than 60 cm in

length. Inasmuch as these woven cotton handkerchiefs bear ornamental designs stitched in contrasting color and will be marketed so as to be visible to the purchaser, we have determined that the decorative stitching has produced an ornamental effect and performs a commercial purpose.

In view of the foregoing, the subject handkerchiefs are "embroidered" within the meaning of the HTSUSA.

Holding:

NY G83802, dated October 23, 2000, is hereby revoked.

The subject merchandise is correctly classified in subheading 6213.20.2000, HTSUSA, which provides for "Handkerchiefs: Of cotton: Other." The general column one duty rate is 7.2 percent *ad valorem*. The textile category is 330.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN DURANT,
Director,
Commercial Rulings Division.

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF TEXTILE STORAGE/PROTECTOR POUCHES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to the classification of textile storage/protector pouches.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter relating to the tariff classification of textile storage/protector pouches under the Harmonized Tariff Schedule of the United States (HTSUS), and revoking any treatment previously accorded by the Customs Service to substantially identical merchandise. Notice of the proposed revocation was published in the CUSTOMS BULLETIN on May 23, 2001, Vol. 35, No. 21. No comments were received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 22, 2001.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textile Branch, (202) 927–2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on May 23, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 21, proposing to revoke Customs New York Ruling (NY) F88775, dated July 13, 2000, pertaining to the tariff classification of textile storage/protector pouches under the HTSUS. No comments were received in response to this notice.

In NY F88775, Customs ruled that the subject item was properly classified in subheading 4202.92.3031, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for travel, sports and similar bags, with outer surface of textile materials, other, of man-made-fibers, other. The corresponding textile quota category is 670.

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking NY F88775, and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter (HQ) 964393 (see "Attachment" to this document). Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

As stated in the proposal notice, this revocation will cover any rulings on this merchandise which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e., ruling letter, internal advice memorandum or decision or pro-

test review decision) on the merchandise subject to this notice, should have advised the Customs Service during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930 (19 U.S.C. 1625(c)(2)), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions. This treatment may, among other reasons, be the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUS. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise Customs of substantially identical transactions or of a specific ruling not identified in this notice, may raise the rebuttable issues of reasonable care on the part of the importer or their agents for importations of merchandise subsequent to the effective date of this notice.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: July 30, 2001.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachment]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 30, 2001.

CLA–2 RR:CR:TE 964393 ASM
Category: Classification
Tariff No. 4202.92.9026

ELI J MAMIYE, VP
INNOVATIVE PRODUCTS INT'L, INC.
Plaza 34, Suite U
1070 State Route 34
Matawan, NJ 07747

Re: Request for reconsideration and Revocation of NY F88775: Classification of Textile Storage/Protector Pouches.

DEAR MR. MAMIYE:

This is in response to your letter, dated July 17, 2000, requesting reconsideration of Customs New York Ruling (NY) F88775, dated July 13, 2000, regarding the classification of a textile storage/protector pouch under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). We have reviewed this ruling and determined that the classification provided for this merchandise is incorrect. This ruling revokes NY F88775 by providing the correct classification for the subject merchandise. A sample was submitted to this office for examination.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of NY F88775 was published on May 23, 20001, in the CUSTOMS BULLETIN, Volume 35, Number 21. No comments were received in response to this notice.

Facts:

The subject merchandise is identified as the "Intercept Protector" pouch and is manufactured with an exterior surface of textile man-made material. It is our understanding that the pouches will be imported in various sizes ranging from approximately 3 inches x 5 inches to 14 inches x 14.5 inches. The opening of the pouch has extra length, which folds over one time and is secured by a hook and loop fastener. The interior contains a copper color lining of plastic sheeting with a black mesh overlay. The packaging states that the pouch is a protector for: cameras, binoculars, electronic flashes, computers, digital and electronic equipment, audio/video products, radio, "Walkman", disc-man, mini-disc, photos, palm held devices, photos, film material, and any other product subject to corrosion. According to the packaging, the "Intercept Protector" has been designed to react with and neutralize corrosive atmospheric gases thereby ensuring a longer life for the protected product.

In New York Ruling Letter (NY) F88775, dated July 13, 2000, the subject item was classified in subheading 4202.92.3031, Harmonized Tariff Schedule of the United States Annotated (HTSUSA), which provides for travel, sports and similar bags, with outer surface of textile materials, other, of man-made-fibers, other. The corresponding textile quota category is 670. You disagree with this classification and claim that the "Intercept Protector" storage pouch has been designed exclusively for long term storage. You further note that the product is "specifically suited to store and protect the contents from long term corrosion." Finally, you note that the lack of a handle precludes ease of transport, portability, and organization of contents.

Issue:

What is the proper classification for the merchandise?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

Heading 4202, HTSUSA, specifically covers various cases and containers, and provides as follows:

> Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper.

The EN to heading 4202 indicates that the heading covers only the articles specifically named and similar containers. While this type of protector pouch is not specifically named in heading 4202, HTSUSA, the subject pouch is similar to the "binocular cases" and "camera cases" specified in heading 4202, in that it is designed to contain and protect binoculars and cameras and various electronic equipment. According to the EN, the expression "similar containers" in the first part (prior to the semi-colon) includes camera accessory cases that may be of a rigid or soft foundation. The subject "Intercept Protector" pouch is a soft foundation container, which is designed to contain cameras, electronic flashes, film cartridges and various other electronic equipment. However, in order to classify the subject goods as "similar" under heading 4202, HTSUSA, we must look to additional factors,

which would identify the merchandise as being *ejusdem generis* (of a similar kind) to those specified in the provision.

In the case of *Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867(1994), *aff'd.* 69 F. 3d 495 (1992), the Court of Appeals stated as follows:

> As applicable to classification cases, ejusdem generis requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated eo nomine [by name] in order to be classified under the general terms.

In classifying goods under the residual provision of "similar containers" of heading 4202, HTSUSA, the Court of Appeals affirmed the trial court's decision and found that the rule of *ejusdem generis* requires only that the imported merchandise share the essential character or purpose running through all the containers listed *eo nomine* in heading 4202, HTSUSA., *i.e.*, "* * * to organize, store, protect and carry various items."

Clearly, the "Intercept Protector" pouch has been designed to store and protect various electronic items. The packaging provides two pictures which detail the results of a 10 year test where a camera was placed in the "Intercept Protector" pouch (no visible corrosion) as compared to one that was not in an "Intercept Protector" pouch (visible corrosion). Pursuant to the *Totes* case (*supra)* the subject pouches are classifiable under heading 4202, HTSUSA, because they share with the containers listed *eo nomine*, the essential characteristics of organizing, storing, and protecting their contents. Although you have asserted that the pouches are precluded from classification under heading 4202, HTSUSA, because they are designed for protective long term storage, it is our opinion that this fact provides additional evidence that the pouches share the characteristics enumerated in *Totes*. The "Intercept Protector" pouches provide a means of *organizing* and *storing* various electronic equipment and *protecting* the items from corrosion for an extended period of time. Furthermore, the pouches come in various sizes thus facilitating their usefulness in the long term storage and organization of electronic equipment including a camera and such accessories as a flash component, film cartridges, batteries, fuses, etc.

Headquarters Ruling (HQ) 954438, dated November 5, 1993, involved a container made of plastic sheeting material designed to provide a protective cover for a wood moisture meter when not in use. In this ruling, it was determined that the item was a "similar container" to certain cases listed *eo nomine* under heading 4202, HTSUSA, and was classifiable under the provision because it was specially shaped or fitted to hold a particular article and provided protective storage for the article contained therein. Thus, HQ 954438 provides additional support for classification of the subject merchandise as a "similar container" under heading 4202, HTSUSA, because the "Intercept Protector" is also a soft foundation container which has been designed to provide protective storage. Although containers that are "specially shaped or fitted" are usually intended to organize, store, protect, or carry their contents, this is not one of the enumerated criteria of *Totes* (*supra*). Thus, the fact that the "Intercept Protector" is not "specially shaped or fitted" doesn't exclude the article from classification under heading 4202, HTSUSA, as a "similar container." The cases of *Totes* (*supra*) and *Jewelpak Corp.* (*supra*) have broadened the scope of "similar containers" classifiable under heading 4202, HTSUSA, in that classification under the provision only requires that the article share one or more of the characteristics of the containers listed *eo nomine*, *i.e.*, organizing, storing, protecting or carrying various items. Evidence of the pouch's anti-corrosive properties demonstrates its suitability for the storage and protection of electronic equipment, including camera equipment.

In view of the foregoing, we have determined that the "Intercept Protector" pouch is not necessarily a generic "traveling bag" and that NY F88775, dated July 13, 2000, should not have classified the merchandise under subheading 4202.92.3031, HTSUSA, which provides for: travel, sports and similar bags, with outer surface of textile materials, other, of man-made-fibers, other. Rather, it is similar to the *eo nomine* goods, "camera cases" and "binocular cases" and is properly classified as an "other" bag in subheading 4202.92.90, HTSUSA.

Holding:

NY F88775, dated July 13, 2000, is hereby revoked.

The subject merchandise is correctly classified in subheading 4202.92.9026, HTSUSA, which provides for, "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of

sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other, With outer surface of textile materials: Other: Of man-made fibers." The general column one rate of duty is 18.6 percent *ad valorem*. The quota category is 670.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office. Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchandise, you should contact your local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

REVOCATION OF RULING LETTER AND TREATMENT RELATING TO THE CLASSIFICATION OF A WOMAN'S WOOL KNIT CARDIGAN

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of revocation of a ruling letter and treatment relating to the classification of a woman's wool knit cardigan.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub.L. 103–182, 107 Stat. 2057), this notice advises interested parties that Customs is revoking a ruling letter relating to the tariff classification of a woman's wool knit cardigan under the Harmonized Tariff Schedule of the United States (HTSUS), and revoking any treatment previously accorded by the Customs Service to substantially identical merchandise. Notice of the proposed revocation was published in the CUSTOMS BULLETIN on March 14, 2001, Vol. 35, No. 11. No comments were received in response to this notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after October 22, 2001.

FOR FURTHER INFORMATION CONTACT: Ann Segura Minardi, Textile Branch, at (202) 927–2380.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub.L.

103–182, 107 Stat. 2057), (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended and related laws. Two new concepts which emerge from the law are **"informed compliance"** and **"shared responsibility."** These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, (19 U.S.C. section 1484) the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. 1625(c)(1)), as amended by section 623 of Title VI, a notice was published on March 14, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 11, proposing to revoke PD A86013, dated August 16, 1996, pertaining to the tariff classification of a woman's wool knit cardigan under the HTSUS. No comments were received in response to this notice.

In PD A86013, Customs ruled that a woman's wool knit cardigan was classified in subheading 6110.10.2080, HTSUSA, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of wool or fine animal hair: Other, Other: Women's or girls." Since the issuance of this ruling, Customs has reviewed the classification of these items and has determined that the cited ruling is in error. We have determined that this item should be classified in subheading 6110.10.2030, HTSUSA, which provides for, "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of wool or fine animal hair: Other, Sweaters: Women's."

Customs, pursuant to 19 U.S.C. 1625(c)(1), is revoking PD A86013 dated August 16, 1996, and any other ruling not specifically identified, to reflect the proper classification of the merchandise pursuant to the analysis set forth in Headquarters Ruling Letter HQ 964517 (see "Attachment" to this document). It should also be noted that in the CUSTOMS BULLETIN, dated March 14, 2001, Vol. 35, No. 11, the proposed ruling letter revoking PD A86013, was inadvertently identified as HQ 959789. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical merchandise.

As stated in the proposed notice, this revocation will cover any rulings on this issue which may exist but have not been specifically identified. Any party who has received an interpretive ruling or decision (i.e.,

ruling letter, internal advice memorandum or decision or protest review decision) on the issue subject to this notice, should have advised Customs during the notice period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)(2)), Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importations involving the same or similar merchandise, or the importer's or Customs previous interpretation of the Harmonized Tariff Schedule of the United States. Any person involved in substantially identical transactions should have advised Customs during the notice period. An importer's failure to advise the Customs Service of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

Dated: July 25, 2001.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

[Attachments]

[ATTACHMENT]

DEPARTMENT OF THE TREASURY,
U.S. CUSTOMS SERVICE,
Washington, DC, July 25, 2001.

CLA-2 RR:CR:TE 964517 ASM
Category: Classification
Tariff No. 6110.10.2030

MR. WILLIAM ORTIZ
IMPORT MANAGER
S.J. STILE ASSOCIATES LTD.
153-66 Rockaway Blvd.
Jamaica, NY 11434

Re: Revocation of PD A86013: Classification of woman's wool knit cardigan.

DEAR MR. ORTIZ:

This is in regard to Customs Port of New York/Newark Ruling (PD) A86013, issued to you on August 16, 1996, in reply to your request for a tariff classification ruling of a woman's wool knit cardigan. We have reviewed this ruling and determined that the classification provided for this merchandise is incorrect. This ruling revokes PD A86013 by providing the correct classification for the merchandise. In addition, this is in response to your request on behalf of I.K.L. International, for a reconsideration of PD A86013, which classified a woman's wool knit cardigan under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA). A sample was submitted to this office for examination.

Pursuant to section 625(c), Tariff Act of 1930, as amended (19 U.S.C. 1625(c)), notice of the proposed revocation of PD A86013 was published on March 14, 2001, in the CUSTOMS BULLETIN, Volume 35, Number 11. No comments were received in response to this notice.

Facts:

The subject article is identified as a woman's knit cardigan (Style # 60419) of 100 percent wool fiber. The cardigan has a front opening with V-neckline, a single hook and eye closure at the waist, long sleeves, and beading. Based on our current assessment, the knit fabric is comprised of less than nine stitches per two centimeters, measured in the horizontal direction.

In PD A86013 dated August 16, 1996, the subject garment was classified in subheading 6110.10.2080, HTSUSA, which provides for "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of wool or fine animal hair: Other, Other: Women's or girls" with a corresponding textile quota category of 438. This classification was based on the determination that the fabric contained more then ten stitches per two centimeters in the horizontal direction.

Issue:

What is the proper classification for the merchandise?

Law and Analysis:

Classification under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is made in accordance with the General Rules of Interpretation (GRI). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRI may then be applied. The Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

At this time, it is Customs determination that PD A86013, based the classification determination of the subject article on an erroneous stitch measurement of "more than ten stitches per two centimeters in the horizontal direction." In fact, the cardigan has less than nine stitches per two centimeters in the horizontal direction. Statistical Note 3, Chapter 61, HTSUSA, states as follows:

> 3. For purposes of this chapter, statistical provisions for sweaters include garments, whether or not known as pullovers, vests or cardigans, the outer surfaces of which are constructed essentially with 9 or fewer stitches per 2 centimeters measured in the direction the stitches were formed, and garments, known as sweaters, where, due to their construction, the stitches on the outer surface cannot be counted in the direction the stitches were formed.

Thus, at the statistical level, the provision for "Sweaters" under subheading 6110.10.2030, HTSUSA, would include the subject cardigan because it is constructed with fewer than 9 stitches per 2 centimeters.

Holding:

PD A86013 is hereby revoked.

The subject merchandise is correctly classified in subheading 6110.10.2030, HTSUSA, which provides for, "Sweaters, pullovers, sweatshirts, waistcoats (vests) and similar articles, knitted or crocheted: Of wool or fine animal hair: Other, Sweaters: Women's." The general column one duty rate is 16.4 percent *ad valorem*. The textile category is 446.

The designated textile and apparel category may be subdivided into parts. If so, visa and quota requirements applicable to the subject merchandise may be affected. Since part categories are the result of international bilateral agreements which are subject to frequent renegotiations and changes, to obtain the most current information available, we suggest that you have your client check, close to the time of shipment, the *Status Report on Current Import Quotas (Restraint Levels)*, an internal issuance of the U.S. Customs Service, which is available for inspection at your local Customs office.

Due to the changeable nature of the statistical annotation (the ninth and tenth digits of the classification) and the restraint (quota/visa) categories applicable to textile merchan-

dise, your client should contact the local Customs office prior to importation of this merchandise to determine the current status of any import restraints or requirements.

In accordance with 19 U.S.C. 1625(c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN ELKINS,
(for John Durant, Director,
Commercial Rulings Division.)

U.S. Customs Service

Proposed Rulemaking

19 CFR Parts 12, 113, 151, and 162

RIN 1515–AC87

DOG AND CAT PROTECTION ACT

AGENCY: Customs Service, Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document proposes to amend the Customs Regulations to implement certain provisions of the Dog and Cat Protection Act of 2000. The Dog and Cat Protection Act of 2000 prohibits the importation of any products containing dog or cat fur, and provides for civil and criminal penalties for violations of the Act. This document proposes to set forth in the regulations the prohibitions on dog and cat fur importations and the penalties for violations. The document also proposes to implement the provision of the Act pertaining to Customs certification of domestic and foreign commercial laboratories to test products to determine if the products intended to be imported into the United States contain dog or cat fur. The proposed regulations implement Federal law prohibiting these imports in order to discourage inhumane practices abroad concerning the treatment of dogs and cats.

DATES: Comments must be received on or before October 9, 2001.

ADDRESSES: Written comments may be addressed to, and inspected at, U.S. Customs Service, Office of Regulations and Rulings, Regulations Branch, 1300 Pennsylvania Avenue, 3rd Floor, NW, Washington, D.C. 20229.

FOR FURTHER INFORMATION CONTACT:

On laboratory procedures—Renee Stevens, Laboratories & Scientific Services, Office of Information and Technology, (202) 927–0941;

On trade enforcement matters—Luan T. Cotter, Trade Programs—Commercial Enforcement, Office of Field Operations, (202) 927–1249; and

On penalty and forfeiture policy and procedural matters—Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings, (202) 927–2344.

SUPPLEMENTARY INFORMATION:

BACKGROUND

I. *The Dog and Cat Protection Act of 2000, in general*

Congress found that products made with dog and cat fur are being imported into and sold in the United States and that these products are often deceptively labeled to prevent consumers, as well as retailers and importers, from ascertaining the true content of the fur contained in the products they purchase in the U.S. Congress also found that available evidence suggests that producers of dog and cat fur products house, transport, and slaughter these dogs and cats for their fur in inhumane ways. Based on these findings, Congress promulgated the Dog and Cat Protection Act of 2000 (the "Act"), as chapter 3 of Subtitle B of Title I of the Tariff Suspension and Trade Act of 2000. This Act was signed into law on November 9, 2000 (Pub.L. 106–476, 114 Stat. 2101, codified at 19 U.S.C. 1308).

The provisions of the Act amend Title III of the Tariff Act of 1930 by adding a new section 308, entitled "Prohibition on importation of dog and cat fur products." In general, the provisions of the new section 308 prohibit the importation, exportation, introduction into interstate commerce, manufacture for introduction into interstate commerce, offer for sale, sale, transportation, or distribution in the U.S. of any products made with dog or cat fur. This section also provides for civil and criminal penalties for violations of the Act, including the forfeiture of prohibited products and the potential debarment of individuals from engaging in commerce involving fur products. Further, section 308 also authorizes the Secretary of the Treasury to offer rewards for information concerning violations, and provides any persons accused of certain violations with an affirmative defense if they can demonstrate that they exercised reasonable care in determining the nature of the products alleged to have been imported or exported in violation of the Act. Lastly, this section directs Customs to develop a program of certifying U.S. and foreign laboratories for making reliable assessments of whether products are made with dog or cat fur.

This document proposes to amend the Customs Regulations (19 CFR chapter I) to set forth the prohibited conduct defined in the Act. The document also proposes to set forth the penalty, forfeiture, and reward provisions, and the provision regarding the affirmative defense of reasonable care for persons accused of violating provisions of the Act. In addition the document proposes to implement the provision regarding the accreditation of domestic and foreign laboratories for testing products to determine if the products contain dog or cat fur.

II. *Specific provisions of the Dog and Cat Protection Act of 2000*

A. *Prohibited conduct*

For Customs purposes, the Act prohibits any person from importing into, or exporting from, the U.S. any dog or cat fur product. The Act provides an exception for the importation, exportation, or transportation,

for noncommercial purposes, of deceased personal pets, that includes such pets preserved through taxidermy. The terms "cat fur," "dog fur," "dog or cat fur product," and "person" are specifically defined in the Act.

Prohibited and restricted merchandise are generally provided for in part 12 of the Customs Regulations. It is proposed to add a new subheading for dog and cat fur and to add a new § 12.64 to provide for the Act's provisions pertaining to the prohibited conduct. The definitions for the terms "cat fur," "dog fur," "dog or cat fur product," and "person" will be provided for at paragraph (a) of the new § 12.64. The nature of the prohibited conduct will be provided for at paragraph (b) of the new § 12.64. Paragraph (c) will provide that any products containing dog or cat fur imported or exported contrary to the provisions of § 12.64 are subject to seizure and forfeiture.

B. *Penalty and Reward Provisions*

The Act provides that any person who violates any provision of new section 308, in addition to any other civil or criminal penalty that may be imposed under title 18 of the United States Code or any other provision of law, may be assessed a civil penalty of not more than $ 10,000 for each separate knowing and intentional violation, $ 5,000 for each separate grossly negligent violation, or $ 3,000 for each separate negligent violation. Further, the violator may be prohibited from importing, exporting, or selling any fur product in the United States if it is found that the person engaged in a pattern or practice of actions that has resulted in a final administrative determination with respect to the assessment of civil penalties for knowing and intentional or grossly negligent violations of section 308. In determining the amount of civil penalties assessed for violation of section 308, the degree of culpability, any history of prior violations, ability to pay, the seriousness of the violation, and any other matters as fairness may require will be taken into account. No penalty will be assessed under the Act against a person unless the person is given written notice and an opportunity for a hearing. Lastly, a reward of not less than $ 500 will be paid to any person who furnishes information that establishes or leads to a civil penalty assessment, debarment, or forfeiture of property for any violation of the Act.

These penalty and reward provisions are proposed to be provided for at paragraphs (b)–(d) of new § 162.81. Paragraph (a) of new § 162.81 will reference the prohibited conduct provided for at new § 12.64.

C. *The affirmative defense of reasonable care*

Any person charged with a penalty under the provisions of the Act has a defense to that proceeding if he establishes that he exercised reasonable care in determining the nature of the products alleged to have resulted in such violation, and in ensuring that the products were accompanied by documentation, packaging, and labeling that were accurate as to the nature of the products. One of the procedures prescribed by the Act as an indicia of reasonable care is use of a Customs-accredited laboratory's determination that dog or cat fur is not contained in an

item. While the use of a Customs-accredited laboratory is not required to avoid liability, it may prove dispositive in determining whether the person exercised reasonable care.

This affirmative defense provision is proposed to be provided for in paragraph (e) of new § 162.81.

D. *Customs accreditation of fur testing laboratories*

Section 151.12 of the Customs Regulations (19 CFR 151.12) concerns the accreditation of commercial laboratories. Paragraph (b) of § 151.12 explains, in general, what a Customs-accredited laboratory is and provides that accreditation is restricted to facilities within the United States that analyze certain commodities to determine elements relating to the admissibility, quantity, composition, or characteristics of imported merchandise. Because the Act requires Customs to provide for a process by which accreditation will be extended to foreign testing laboratories that can demonstrate to Customs reliable assessments of whether products intended for sale or consumption in the United States are made with dog or cat fur, it is proposed to amend this paragraph by adding another sentence to explain Customs limited accreditation of foreign laboratories to analyze products to determine if they contain dog or cat fur.

Regarding the process by which testing laboratories, whether domestic or foreign, can qualify for certification by Customs, the application and accreditation procedures currently provided for at § 151.12 and the fee schedule explained in T.D. 99–67 will apply. Paragraph (d) of § 151.12 currently provides that accreditation may be sought by a commercial laboratory in any commodity group listed in paragraph (d)(2) of the section, and explains that applicable test procedures are listed in Commodity Group Brochures. To provide for Customs accreditation of commercial laboratories for purposes of the Act, Customs proposes to amend paragraph (d)(2) to add a new subparagraph (xvi) that will provide for the accreditation of laboratories in the testing of products containing fur, regardless of the classification of the products under the tariff schedule (HTSUS), to determine if the products contain any dog or cat fur. Customs will provide for the dog and cat fur testing procedures in a new Commodity Group Brochure. This proposed amendment will also reference the provisions of proposed §§12.64 and 151.12(b) discussed above.

With the accreditation of foreign laboratory facilities by Customs, further amendments are required regarding bonding, the payment of accreditation/reaccreditation fees, and laboratory operations because the present regulatory scheme only concerns laboratory facilities located and operations occurring in the United States.

Regarding bonding, paragraph (f)(1)(vii) of § 151.12 concerns the agreement of laboratories to execute a bond when notified of pending accreditation and references the provisions of part 113 of the Customs Regulations. The bond conditions for commercial laboratories are at § 113.67(b), which provides, in part, that if the principal defaults, the

obligors must pay liquidated damages and that if the merchandise is restricted merchandise the liquidated damages are equal to three times the value of the merchandise.

Because the risk of malfeasance or nonperformance presented by foreign laboratories accredited by Customs is great, given the distance and lack of enforcement opportunities, and because prohibited, not merely restricted, merchandise is at issue, the following amendments are proposed. First, it is proposed to amend § 151.12(f)(1)(vii) to provide that when laboratories located outside of the United States are notified of pending accreditation/reaccreditation, a bond in the amount of a minimum of $ 1 million will be required to be executed in accordance with the provisions of part 113 of the Customs Regulations. Also, to secure the payment of any liquidated damages which may be assessed against the laboratory, it is proposed to further amend § 151.12(f)(1)(vii) to provide that the foreign laboratory have a designated resident corporate surety in the United States. It is also proposed to amend the provisions of § 113.67(b)(2)(i) to provide that if the principal defaults in the case of a bond taken by a foreign laboratory accredited to test products to determine if the products contain dog or cat fur, the obligors agree to pay liquidated damages equal to nine times the value of the merchandise.

Paragraphs (f)(1)(xi) and (h)(1)(i) of § 151.12 concern the fee requirements for accreditation/reaccreditation of commercial laboratories. With the accreditation of foreign laboratories, foreign exchange rate fluctuations—respecting assessed costs—and the payment of variable fee assessments for international travel, per diem and background expenses prior to Customs review of an application for accreditation become issues. Accordingly, it is proposed to amend the second sentences of these provisions to limit their scope to domestic laboratories and to add new third sentences to provide that foreign laboratories applying for accreditation/reaccreditation must submit the whole of variable charges assessed for international travel, per diem and background expenses in U.S. currency before Customs will undertake to review their application for accreditation.

A change is also needed to paragraph (j) of § 151.12, which concerns how Customs-accredited laboratories should operate. Paragraph (j)(1) explains the procedure to be followed regarding the testing of sample merchandise. The paragraph requires Customs supervision when merchandise samples are split for testing by accredited laboratories. Since the dog and cat fur-testing operations of foreign laboratories will be outside of the United States, Customs cannot supervise the procedure regarding the splitting of samples. Accordingly, this regulatory provision must be amended. It is proposed to amend paragraph (j) by adding a sentence that provides that the requirements regarding samples only apply to domestic laboratory operations and not to foreign laboratory operations accredited for purposes of the Dog and Cat Protection Act of 2000. Another sentence will be added to require that if a foreign laboratory accredited by Customs to test for dog and cat fur certifies that the

product does not contain dog or cat fur, the certification submitted by an importer must be accompanied by the reports of the laboratory's testing result.

III. *Miscellaneous and organizational change*

On September 21, 2000, the Commissioner of Customs announced certain organizational changes at Customs. One of these changes involved reassigning oversight of the Laboratories & Scientific Services from the Assistant Commissioner, Office of Field Operations, to the Assistant Commissioner, Office of Information and Technology (OIT). This action was taken so that Laboratories & Scientific Services could take better advantage of the technical expertise and services offered by OIT. Because the regulations providing for commercial laboratories expressly reference the Office of Field Operations at § 151.12(a), it is proposed to amend this provision to reference the Office of Information and Technology.

COMMENTS

Before adopting these proposed regulations as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4 of the Treasury Department Regulations (31 CFR 1.4), and § 103.11(b) of the Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, 3rd Floor, NW, Washington, D.C.

THE REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Pursuant to provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that, if adopted, the proposed amendments will not have a significant economic impact on a substantial number of small entities. The proposed amendments merely set forth statutory prohibitions on the importation of products containing dog and cat fur and provide for a laboratory certification process that Customs has been directed to implement. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

PAPERWORK REDUCTION ACT

The collection of information in the current regulations has already been approved by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) and assigned OMB control number 1515–0155 (Application and other documents pertaining to accreditation of commercial laboratories). This notice of proposed rulemaking does not involve any material change to the existing approved information collection.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by OMB.

Part 178 of the Customs Regulations (19 CFR Part 178), which lists the information collections contained in the regulations and control numbers assigned by OMB, would be amended accordingly if this proposal is adopted.

LIST OF SUBJECTS

19 CFR Part 12

Animals, Customs duties and inspection, Entry of merchandise, Exports, Furs, Imports, Labeling, Marking, Prohibited merchandise, Reporting and recordkeeping requirements, Restricted merchandise, Seizure and forfeiture.

19 CFR Part 113

Bonds, Customs duties and inspection, Exports, Foreign commerce and trade statistics, Imports, Laboratories, Reporting and recordkeeping requirements, Surety bonds.

19 CFR Part 151

Customs duties and inspection, Examination, Exports, Imports, Laboratories, Licensing, Penalties, Reporting and recordkeeping requirements, Sampling and testing.

19 CFR Part 162

Administrative practice and procedure, Customs duties and inspection, Exports, Imports, Inspection, Law enforcement, Penalties, Prohibited merchandise, Restricted merchandise, Reporting and recordkeeping requirements, Seizures and forfeitures.

PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend parts 12, 113, 151, and 162 of the Customs Regulations (19 CFR parts 12, 113, 151, and 162) as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

1. The general authority citation for part 12 continues, and a new specific authority for new § 12.64 is added, to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * * * *

Section 12.64 also issued under 19 U.S.C. 1308;

* * * * * * *

2. A new center heading consisting of § 12.64 is added after § 12.63 to read as follows:

DOG AND CAT FUR

§ 12.64 Products containing dog and cat fur prohibited.

(a) *Definitions.* For purposes of this section, the following terms have the meanings indicated:

Cat fur. "Cat fur" means the pelt or skin of any animal of the species *Felis catus*.

Dog fur. "Dog fur" means the pelt or skin of any animal of the species *Canis familiaris*.

Dog or cat fur product. "Dog or cat fur product" means any item of merchandise which consists, or is composed in whole or in part, of any dog fur, cat fur, or both.

Person. "Person" means any individual, partnership, corporation, association, organization, business trust, government entity, or other entity subject to the jurisdiction of the U.S.

(b) *Prohibited merchandise.*—(1) *Imported or exported.* It is unlawful for any person to import into, or export from, the U.S. any dog or cat fur product.

(2) *Exception.* The provisions of paragraph (b)(1) of this section do not apply to the importation or exportation for noncommercial purposes, of deceased personal pets, including such pets preserved through taxidermy.

(c) *Forfeiture.* Any dog or cat fur product imported or exported contrary to the provisions of this section is subject to seizure and forfeiture.

PART 113—CUSTOMS BONDS

1. The general authority citation for part 113 continues to read as follows:

Authority: 19 U.S.C. 66, 1623, 1624.

* * * * * * *

2. In § 113.67(b)(2)(i), a new sentence is added to the end to read as follows:

§ 113.67 Commercial gauger and commercial laboratory bond conditions.

* * * * * * *

(b) * * *

(2) * * *

(i) * * *. If the principal defaults in the case of a bond taken by a foreign laboratory accredited to test products to determine if the products contain dog or cat fur, the obligors agree to pay liquidated damages equal to nine times the value of the merchandise. (See, § 151.12(f)(1)(vii) of this chapter.)

* * * * * * *

PART 151—EXAMINATION, SAMPLING, AND TESTING OF MERCHANDISE

1. The general authority citation for part 151 continues, and a new specific authority citation for § 151.12 is added, to read as follows:

Authority: 19 U.S.C. 66, 1202 (General Notes 22 and 23, Harmonized Tariff Schedule of the United States (HTSUS)), 1624.

Subpart A also issued under 19 U.S.C. 1499.
Section 151.12 also issued under 19 U.S.C. 1308;

* * * * * * *

2. In § 151.12:

a. paragraph (a) is amended at the definition for "Assistant Commissioner" by removing the words "Office of Field Operations" and adding, in their place, the words "Office of Information and Technology";

b. paragraph (b) is amended by revising the second sentence and by adding a new third and fourth sentence;

c. paragraph (d)(2) is amended by adding a new paragraph (d)(2)(xvi);

d. paragraph (f) is amended:

(i) at paragraph (f)(1)(vii) by adding a new sentence at the end of the paragraph;

(ii) at paragraph (f)(1)(xi) at the second sentence by removing the words "the applicant agrees" and adding, in their place, the words "domestic applicants agree"; and, by adding a new third sentence; and

(iii) by adding a new paragraph (f)(1)(xii); and

e. paragraph (h)(1)(i) is amended at the second sentence by removing the words "Before a laboratory" and adding, in their place, the words "Before a domestic laboratory"; and by adding a new third sentence;

f. paragraph (j)(1) is amended by revising the first sentence and adding a new sentence at the end of the paragraph.

The additions and revisions to read as follows:

151.12 Accreditation of commercial laboratories.

* * * * * * *

(b) * * *. A "Customs-accredited laboratory" is a commercial laboratory that has demonstrated, to the satisfaction of the Executive Director, pursuant to this section, the capability to perform analysis of certain commodities to determine elements relating to the admissibility, quantity, composition, or characteristics of imported merchandise. For accreditations other than accreditation to determine whether dog or cat fur is contained in articles, a commercial laboratory must be located in the United States. For accreditation to determine whether dog or cat fur is contained in any articles intended for sale or consumption in the United States, a commercial laboratory may be located in a foreign country or the United States. * * *

* * * * * * *

(d) * * *

(2) * * *

(xvi) Products, regardless of the chapter of the tariff schedule (HTSUS) under which they are classified when entered, to determine if they contain any dog or cat fur (see §§ 12.64, 151.12(b), and 162.81 of this chapter).

* * * * * * *

(f) * * *

(1) * * *

(vii) * * *. If the commercial laboratory is seeking accreditation for determination of whether a product contains dog or cat fur and is located outside of the United States, the express agreement must provide that the foreign laboratory will execute a bond in accordance with part 113, Customs Regulations, in an amount of a minimum of $ 1 million, will submit the bond to Headquarters, and that the laboratory will have a resident corporate surety in the United States to secure the payment of any liquidated damages that may be assessed against the laboratory; the application in this instance must identify the name and address of the resident corporate surety.

* * * * * * *

(xi) * * *. Foreign applicants applying for accreditation/reaccreditation regarding the testing of products for dog and cat fur (see §§ 12.64, 151.12(b), and 162.81 of this chapter) must submit all variable charges assessed for international travel, per diem and background expenses in U.S. currency before Customs will undertake to review their application for accreditation.

(xii) If a commercial laboratory is seeking accreditation for determination of whether a product contains dog or cat fur and is located outside of the United States, the name and address of a resident agent in the United States who is authorized to accept service of process against the foreign laboratory.

* * * * * * *

(h) * * *

(1) * * *

(i) * * *. Foreign laboratories applying for accreditation/reaccreditation regarding the testing of products for dog and cat fur (see §§ 12.64, 151.12(b), and 162.81 of this chapter) must submit all variable charges assessed for international travel, per diem and background expenses in U.S. currency before Customs will undertake to review their application for accreditation.

* * * * * * *

(j) *How will Customs-accredited laboratories operate.*—(1) *Samples for testing*. For laboratories other than those foreign laboratories accredited to determine whether a product contains dog or cat fur, upon request by the importer of record of merchandise, the port director will release a representative sample of the merchandise for testing by a Customs-accredited laboratory at the expense of the importer. * * *. If a foreign laboratory accredited by Customs to test for dog and cat fur certifies that the product does not contain dog or cat fur, the certification submitted by an importer must be accompanied by the reports of the laboratory's testing result as set forth in paragraph (j)(2) of this section.

* * * * * * *

PART 162--INSPECTION, SEARCH, AND SEIZURE

1. The general authority citation for part 162 continues, and a new specific authority for § 162.81 is added, to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1592, 1593a, 1624.

* * * * * * *

Section 162.81also issued under 19 U.S.C. 1308;

* * * * * * *

2. In § 162.70:

a. paragraph (a)(1) is amended by removing the word "and" at the end of the paragraph and adding a semicolon;

b. paragraph (a)(2) is amended by removing the period at the end and adding, in its place, a semicolon and the word "and"; and

c. a new paragraph (a)(3) is added, to read as follows:

§ 162.70 Applicability.

(a) * * *

(3) Violations of section 308, Tariff Act of 1930, as amended (19 U.S.C 1308), that occur after November 9, 2000.

* * * * * * *

3. A new § 162.81 is added, to read as follows:

§ 162.81 Penalties for importation or exportation of products containing dog or cat fur.

(a) *Products containing dog or cat fur.* Any person importing into, or exporting from, the U.S. any dog or cat fur product in contravention of the provisions of § 12.64 of this chapter is subject to civil penalties and the merchandise is subject to seizure and forfeiture.

(b) *Civil monetary penalties.*—(1) *Assessment under 19 U.S.C. 1308.* Any person who imports or exports from the U.S. any dog or cat fur product in contravention of the provisions of § 12.64 of this chapter may, in addition to any other civil or criminal penalty that may be imposed under title 18, United States Code, or any other provision of law, be subject to civil monetary penalties for violation of 19 U.S.C. 1308 of not more than $ 10,000 for each separate knowing and intentional violation of this section, or not more than $ 5,000 for each separate grossly negligent violation of this section, or not more than $ 3,000 for each separate negligent violation.

(2) *Assessment under 19 U.S.C. 1592 or 19 U.S.C. 1595a(b).* Any person who imports into the U.S. any dog or cat fur product in contravention of the provisions of § 12.64 of this chapter may be assessed, in addition to or in lieu of any other civil monetary penalty or penalties, civil monetary penalties under 19 U.S.C. 1592 or 19 U.S.C. 1595a(b). These penalties will be administered under Part V, Tariff Act of 1930, as amended.

(3) *Notice.* In accordance with 19 U.S.C. 1308(c)(1)(D), no penalty may be assessed or imposed under the provisions of paragraphs (b)(1) or (c) of this section against a person unless the person is given notice

and opportunity for a hearing with respect to such violation, in accordance with section 554 of title 5, United States Code.

(4) *Factors in assessing penalties.* In determining the amount of civil penalties assessed under paragraphs (b)(1) or (c) of this section, the Secretary of the Treasury will take into account the degree of culpability, any history of prior violations under this statute and regulations, ability to pay, the seriousness of the violation, and such other matters as fairness may require.

(c) *Debarment.* In accordance with 19 U.S.C. 1308(c)(1)(B), the Secretary of the Treasury may prohibit a person from importing or exporting any fur product into or out of the United States if the Secretary finds that the person has engaged in a pattern or practice of actions that has resulted in a final administrative determination with respect to the assessment of civil monetary penalties for knowing and intentional or grossly negligent violations of § 12.64 of this chapter.

(d) *Reward.* The Secretary of the Treasury will pay a reward of not less than $ 500 to any person who furnishes information that establishes or leads to a civil penalty assessment, debarment, or forfeiture of property for any violation of 19 U.S.C. 1308 or any regulation issued thereunder.

(e) *Affirmative defense.* Any person accused of a violation under 19 U.S.C. 1308 has a defense in any proceeding brought under paragraphs (b)(1) or (c) of this section or 19 U.S.C. 1308 if that person establishes by a preponderance of the evidence that he exercised reasonable care in determining the nature of the products alleged to have resulted in the violation and in ensuring that the products were accompanied by documentation, packaging, and labeling that were accurate as to the nature of the products. If the person can show that the products imported were tested by a Customs-accredited laboratory (see, § 151.12) to attempt to determine the nature of fur contained in an article, the use of a Customs-accredited laboratory may prove dispositive in determining whether that person exercised reasonable care for purposes of applying applicable penalty provisions.

CHARLES W. WINWOOD.
Acting Commissioner of Customs,

Approved: July 18, 2001.
TIMOTHY E. SKUD,
Acting Deputy Assistant Secretary of the Treasury.

[Published in the Federal Register, August 10, 2001 (66 FR 42163)]

United States Court of International Trade

One Federal Plaza
New York, N.Y. 10278

Chief Judge

Gregory W. Carman

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Donald C. Pogue
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Clerk

Leo M. Gordon

Decisions of the United States Court of International Trade

(Slip Op. 01–91)

CARRINI, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–05–00845

[Plaintiff's Motion for Summary Judgment Granted; Defendant's Cross-motion for Summary Judgment Denied.]

(Decided August 2, 2001)

Law Offices of Elon Pollock, PC, (Elon A. Pollock), Eugene P. Sands, for Plaintiff.
Stuart E. Schiffer, Acting Assistant Attorney General, United States Department of Justice; *Joseph I. Liebman,* Attorney In Charge, International Trade Field Office; *(Bruce N. Stratvert),* Civil Division, Commercial Litigation Branch, United States Department of Justice; *Beth C. Brotman,* Office of Assistant Chief Counsel, International Trade Litigation, United States Customs Service, of counsel, for Defendant.

OPINION

I. INTRODUCTION

BARZILAY, *Judge:* This case is before the court on cross-motions for summary judgment. Plaintiff ("Carrini"), an importer of moderately priced women's shoes, challenges Defendant's ("Customs") reclassification of Carrini Style No. 7606 shoe, from the 1996 Harmonized Tariff Schedule of the United States ("HTSUS") provision 6402.99.1865 to provision 6402.99.3060, which raised import duties on the shoe from 6% *ad valorem* to 37.5% *ad valorem*. The essence of the classification difference between the parties centers on whether the uppers of the shoe are more or less than 90% plastic. Carrini contends that Customs improperly included the shoe's laces when calculating the composition of the uppers, thereby disallowing classification under 6402.99.1865. This court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(a) (1994).

II. BACKGROUND

Carrini imported 39,168 pairs of Style No. 7606 shoes in May and June of 1996. *See Pl.'s Separate Statement of Undisputed Facts ("Pl.'s Statement")* at ¶ 1. Style 7606 consists of

> a high heeled, woman/misses sandal style shoe with an exterior upper surface comprised of five (5) sets of plastic/rubber straps, which

> are folded to create ten (10) looped ends that serve as eyelets. * * * Flat ends of the straps are sewn into the sole of the shoe so that the straps and loops fall on the top of the foot, five (5) per side. To hold the shoe on the wearer's foot, the looped ends are held together by means of a textile lace, *threaded though the loops* [and crossing over the foot], which the wearer must pull tight and tie.

See Mem. of P. & A. in Supp. of Pl.'s Mot. for Summ. J. ("Pl.'s Mem.") at 2 (citations omitted). The shoes originated in China, and were exported from Hong Kong to the United States through the Port of Los Angeles, California. *See Pl.'s Statement* at ¶ 2. Carrini entered the merchandise at a duty rate of 6% *ad valorem* under HTSUS provision 6402.99.1865. *See id.* at ¶ 9. Provision 6402.99.1865 covers shoes with uppers that have an external surface area of more than 90% rubber or plastic.

On July 10, 1996, Customs sampled the merchandise and determined that Style 7606 had an upper with an external surface area ("ESAU") consisting of 87.6% rubber or plastic and 12.4% textile. *See id.* at ¶ 12. In its calculation, Customs included the shoe's textile laces, except the portions covered by the shoe's plastic loops. *See id.* at ¶ 11; *Def's Resp. to Pl's Statement of Undisputed Facts ("Def's Resp.")* at ¶ 11. Following this determination, Customs issued a Notice of Action to reclassify Style 7606 under HTSUS provision 6402.99.3060 at the higher duty rate of 37.5% *ad valorem*. *See Pl.'s Statement* at ¶ 14.

On August 9, 1996, the entries were liquidated. *See id.* at ¶ 15. Carrini filed a timely protest to the reclassification on November 1, 1996. *See id.* at ¶ 16. Customs denied Carrini's protest on November 14, 1996, and on May 15, 1997, Carrini filed this action. *See id.* at ¶ 17. Carrini seeks reliquidation of the merchandise at a rate of 6% *ad valorem* under HTSUS provision 6402.99.1865 on the ground that it was improper to include the shoe's textile laces when calculating the composition of the external surface area of the shoe's upper.

III. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." USCIT R. 56(c). Moreover, summary judgment is a favored procedural device "designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986) (quoting Fed. R. Civ. P. 1); *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed. Cir. 1987). Whether a disputed fact is material is identified by the substantive law and whether the finding of that fact "might affect the outcome of the suit." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In a classification action once the court has decided that no material facts are in dispute, it is then left with a purely legal question involving the meaning and scope of the tariff provision and whether it includes the imported merchandise. *See National Advanced Systems v. United States*, 26 F.3d 1107, 1109 (Fed. Cir. 1994). Although there is a

statutory presumption of correctness for Customs decisions, 28 U.S.C. § 2639(a)(1) (1994), when the court is presented with a question of law in a proper motion for summary judgment, that presumption does not apply. *See Universal Elecs., Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997); *Goodman Mfg., L.P. v. United States*, 69 F.3d 505, 508 (Fed. Cir. 1995) ("Because there was no factual dispute between the parties, the presumption of correctness is not relevant.")

IV. Discussion

The court must determine the proper classification for Carrini Style No. 7606 shoe. Both parties agree that the shoes should be classified under HTSUS subdivision 6402.99. HTSUS provision 6402 reads in pertinent part:

6402:	Other footwear with outer soles and uppers of rubber or plastics:
	Other footwear:
* * * * * * *	
6402.99:	Other:
	Having uppers of which over 90 percent of the external surface area (including any accessories or reinforcements such as those mentioned in note 4(a) to this chapter) is rubber or plastics * * *
* * * * * * *	
6402.99.18:	Other:
* * * * * * *	
6402.99.18.65:	Other:
* * * * * * *	
6402.99.30:	Footwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners, * * *
* * * * * * *	
6402.99.3060:	Other:
	For women

The court must decide whether Customs' classification is the correct one, "both independently and in comparison with the importer's alternative." *Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984). It is "the court's duty to find the *correct* result, by whatever procedure is best suited to the case at hand." *Id.* (footnote omitted). Determining whether the merchandise at issue has been classified under an appropriate tariff "entails a two-step process: (1) ascertaining the proper meaning of specific terms in the tariff provision; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed." *Sports Graphics, Inc. v. United States*, 24 F.3d 1390, 1391 (Fed. Cir. 1994). The proper meaning of the tariff provision is a question of law, while the proper classification for the merchandise is a question of fact. *Id.*

The first step in determining the meaning of a statute is to examine its statutory language. *See United States v. Turkette,* 452 U.S. 576, 580 (1981). "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission et al. v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980). The court assumes that Congress used the language of commerce to draft the tariff provision, and the tariff provisions "are to be construed in accordance with their common and popular meaning, in the absence of a contrary legislative intent." *E.M. Chemicals v. United States,* 920 F.2d 910, 913 (Fed. Cir. 1990) (citations omitted). "To assist it in ascertaining the common meaning of a tariff term, the court may rely upon its own understanding of the terms used, and it may consult lexicographic and scientific authorities, dictionaries, and other reliable information sources." *Brookside Veneers, Ltd. v. United States,* 847 F.2d 786, 789 (Fed. Cir. 1988) (citations omitted). "Additionally, a court may refer to the Explanatory Notes of a tariff subheading, which do not constitute controlling legislative history but nonetheless are intended to clarify the scope of HTSUS subheadings and to offer guidance in interpreting subheadings." *Mita Copystar Am. v. United States,* 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citing *Lynteq Inc. v. United States,* 976 F.2d 693, 699 (Fed. Cir. 1992)). The Explanatory Notes are not binding, but provide guidance particularly "when they specifically include or exclude an item from a tariff heading." *H.I.M./Fathom Inc. v. United States* 21 CIT 776, 779, 981 F. Supp. 610, 613 (1997) (citations omitted).

The General Rules of Interpretation ("GRI") of the HTSUS govern the proper classification of merchandise. *See Orlando Food Corp. v. United States,* 22 CIT ____, ____, 140 F.3d 1437, 1439 (1998). The HTSUS is divided into headings providing general categories of merchandise, which are further divided into more particularized categories by subheadings. *Id.* If an item can be classified correctly under more than one provision, the provision providing the more specific description should be used. GRI 3(a). The article should be described "with the greatest degree of accuracy and certainty." *Orlando Food Corp.*, 140 F.3d at 1441 (citations omitted).

Carrini argues that the shoes should be classified under 6402.99.1865 because if Customs had properly excluded the shoe's laces from its calculation of the upper's surface area, the shoe would be over 90 percent rubber or plastic as required by the provision. The parties agree that if the laces were not included in Customs' calculations, the upper would be over 90 percent rubber or plastic. *See Def.'s Resp.* at ¶ 13. In support of its contention, Carrini provides the court with Customs' rulings on similar issues and argues that they conflict with Customs' position in the current action. Carrini argues that even if the portion of the laces that covers the foot should be included in the surface area calculation, the portion of the lace that forms the bow at the top of the shoe should not be included.

In addition, Carrini contends that the shoes cannot be properly classified under provision 6402.99.3060 because the shoes can be held to the foot only with the aid of laces or fasteners. Carrini argues that the language of HTSUS 6402.99.30, "[f]ootwear with open toes or open heels; footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners," indicates that the legislature intended the latter phrase, "that is held to the foot without the use of laces * * * or other fasteners," to qualify both open toe or heel footwear and that of the slip-on type.

Customs counters Carrini's contention, explaining that the semicolon separating the phrases indicates that the legislature intended two types of footwear to be classified under the section, one describing "footwear with open toes or heels," and one describing "footwear of the slip-on type, that is held to the foot without the use of laces or buckles or other fasteners." HTSUS 6402.99.30. Customs contends that the textile laces were properly included when it calculated the upper's surface area. Therefore, as the shoes could no longer be classified as shoes with uppers over 90 percent of the ESAU of rubber or plastic, Customs argues that the shoes were properly reclassified under provision 6402.99.3060. It states that the previous rulings Carrini provides are irrelevant because the laces on the shoe at issue are different from the laces excluded from the external surface area calculation in the past. *See Def.'s Reply Br. in Support of Mot. for Summ. J. and in Opp'n to Pl.'s Resp. ("Def.'s Reply Br.")* at 3. These laces, Customs argues, "are a significant part of the shoe's structure and come into direct contact with the wearer's foot." *Id.* Customs argues that any attempt to separate the portion of the lace that forms the bow at the top of the shoe from the part which crosses over the foot, is unworkable, as the length will be different for each wearer. *See id.* at 4–5.

The parties agree that the shoe, Carrini Style No. 7606, is classifiable under HTSUS heading 6402. The dispute arises in reference to Customs' inclusion of the shoe's laces in the ESAU calculation. The court holds that the laces of Style No. 7606 should not be included in the calculation of the shoe's ESAU, and therefore, the shoe should be classified under HTSUS provision 6402.99.1865.

Both parties rely on *Inter-Pacific Corp. v. United States*, 8 CIT 132, 594 F. Supp. 739 (1984) to provide a basis for their legal conclusions regarding the shoe's laces. Although *Inter-Pacific* was decided under the Tariff Schedule of the United States ("TSUS"), it can serve as a starting point from which to examine the language of the two similar tariff provisions. The court in *Inter-Pacific* was asked to decide if embroidery could be counted as part of the ESAU of the shoe at issue. *See id. Inter-Pacific* defines external surface area stating:

> [t]he common meaning of the term exterior surface area is clear. It is a sensory perception manifest as being the outermost covering of a particular object without regard to the functionality of the covering. TSUS has effectively changed the classification standard so that the judicial distinction made between the upper and an orna-

> ment attached thereto is no longer of consequence. Rather, of import now is the manner in which something (whether ornamental or not) is attached to the upper. If it is attached in such a way that it covers the underlying plastic surface and a normal viewing discloses that it constitutes at least part of the exterior surface area of the upper then that part constituting the external surface area of the upper must be deemed part of the upper and its composition must be included in arriving at the overall area of the upper.

Inter-Pacific, 594 F. Supp. at 743–44 (footnote omitted).

Customs interpretes this paragraph to mean that the test to decide whether a piece is included in the ESAU calculation is "whether it is visible and whether its removal would damage the shoe so as to render [the shoe] unserviceable as footwear." HQ 960625 (Sept. 17, 1999). Customs reasons that because the shoe cannot be worn without the laces, the laces' removal would damage the shoe. Customs deduces that this, combined with the fact that the laces "visibly cover" the foot, makes the lace an integral part of the shoe which should be included in the ESAU calculation. The court disagrees with Customs' interpretation of the *Inter-Pacific* language. As recognized by Carrini, *Inter-Pacific* focuses on the manner in which the piece is attached to the shoe, not on the functionality of the piece. *See* 594 F. Supp. at 743–44. The court in *Inter-Pacific* emphasized that the ornamentation at issue was "*permanently* sewn on and that it [was] a *permanent part of the exterior surface of the upper.*" *Id.* at 744 (citation omitted). The court recognized that removal of the ornamentation at issue would have "severely if not totally impaired" the marketability of the shoe if removed. *Id.* at 743. The ornamentation in *Inter-Pacific* could not be removed and replaced; it was the unique piece that completed the shoe.

In the case before the court, the laces of Carrini Style No. 7606 shoe are not permanently attached to the upper and would cause no damage to the shoe if removed. Unlike the embroidery on the shoe in *Inter-Pacific*, the laces can be detached without damaging or even affecting the surface of the shoe. The laces can be easily separated from the shoe and easily replaced; their removal would not render the shoe permanently unserviceable. The laces at issue do not form an integral part of the shoe and are not so unusual that the shoe would be useless if these particular laces were removed.

In addition, Customs' interpretation of the tariff provision conflicts with the opinions it has expressed in past decisions. In Treasury Decision 93–88 (October 25, 1993) ("T.D. 93–88") Customs provided footwear definitions which the court finds persuasive when read together with the tariff provision, but which Customs now attempts to repudiate. *See* T.D. 93–88. T.D. 93–88 states that "[t]he 'external surface' of the upper is, in general, the outside surface of what you see covering the foot * * * when the shoe is worn. It does not include: * * * [s]hoe laces which do not cover the foot by themselves. * * *" *Id.* (numbering omitted). The court notes that the word "cover" means concealing, lying over, protecting, or blanketing. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIO-

NARY OF THE ENGLISH LANGUAGE UNABRIDGED 524 (1993). This definition certainly connotes more than just touching the foot. Customs' contention in this case that the laces visibly cover the foot is unsubstantiated, given the definition of the word "cover" and an examination of the sample provided. *See Permagrain Prods., Inc. v. United States*, 9 CIT 426, 429, 623 F. Supp. 1246, 1249 (1985) ("samples of the merchandise may be 'potent' witnesses") (citations omitted). Only small portions of the laces touch the foot, and even those portions do not "cover the foot by themselves" as contemplated by T.D. 93–88 and the common meaning of "cover." The laces at issue do not "cover the foot by themselves," and therefore should not be included in the ESAU.

Customs also attempts to use the "add back" provision of Chapter 64 to include the laces in the ESAU calculation as accessories. Note 4(a) of Chapter 64 of HTSUS states that "[t]he material of the upper shall be taken to be the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments." HTSUS, Chapter 64, Note 4(a) (1996). However, the disputed section 6402.99.18 states that the external surface area of the upper should *include* "any accessories or reinforcements such as those mentioned in Note 4(a) to this chapter." HTSUS 6402.99.18. Here, Customs contends that laces should be included among the accessories or reinforcements that are mentioned in Note 4(a).

Customs cites the Explanatory Notes to Chapter 64 in support of the proposition that the legislature intended that laces be included in Note 4(a). General Explanatory Note D explains that in determining the material which has the greatest external surface area, no account should be taken of "accessories or reinforcements such as ankle patches, protective or ornamental strips or edging, other ornamentation (e.g., tassels, pompons, or braid), buckles, tabs, eyelet stays, laces, or slide fasteners." Harmonized Commodity Description and Coding System, Explanatory Notes, (2nd ed. 1996) at 957. Customs posits that consistency requires laces to be included in accessories here if they are excluded as accessories in Note 4(a) where laces are not specifically enumerated.

However, in past rulings Customs has consistently decided that the tongue and laces were not intended to be included in Note 4(a) and therefore, not included in the calculation. *See e.g.* HQ 081305 (March 10, 1988), NY G84080 (November 22, 2000), NY C83650 (February 6, 1998). The court agrees with Customs' position displayed in HQ 081305 that:

> it appears unlikely that the authors of the Harmonized System would not have included them as examples in 4(a) if they intended them to be considered as such. Also, neither tongues nor laces appear to be "sui generis" with the examples given in that all the examples are presumable firmly affixed to the balance of the upper (unlike the easily removable and replaceable shoelaces). * * *"

HQ 081305. The ruling continues, "it is [Customs'] opinion that the tongue and laces were not intended to be part of the upper's 'external surface' per se." *Id.* The court finds this logic persuasive and holds that the laces were not intended to be included among the accessories or reinforcements referred to in Note 4(a).[1] The court finds unpersuasive the reasons proffered in this case for Customs' change in position.

Customs attempts to distinguish this ruling because the shoes are different types and the laces at issue touch the foot. The court holds that mere contact with the foot does not meet the standards contemplated by the legislature in enacting the provision at issue, the court in *Inter-Pacific,* and recognized by Customs in the past. The laces at issue here do not cover the foot by themselves. The laces do not form an integral, unique, or unreplaceable part of the shoe, nor should they be included among the accessories and reinforcements of Note 4(a). Therefore, the court holds that the shoe's laces should not be included in the ESAU calculation for Carrini Style No. 7606 shoe.

Since the court has decided the proper classification on the basis of the language and interpretation of HTSUS 6402.99.1865, it need not and does not reach the issue of whether the shoe could be classified under HTSUS 6402.99.3060.

V. CONCLUSION

For the foregoing reasons, the court holds that the Carrini Style No. 7606 shoe should be classified under HTSUS provision 6402.99.1865. Judgment will be entered accordingly.

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[1] Following *United States v. Mead Corp.*, Customs' classification rulings are only entitled to *Skidmore* deference, meaning "a respect proportional to its 'power to persuade.'" 533 U.S. ____, ____, 121 S. Ct. 2164, 2175 (2001) (quoting *Skidmore v. Swift Co,*, 323 U.S. 124, 140 (1944)). Customs' classification rulings are "beyond the *Chevron pale.*" *Id.*

(Slip Op. 01-93)

BETHLEHEM STEEL CORP., U.S. STEEL GROUP, A UNIT OF USX CORP., ISPAT INLAND INC., LTV STEEL CO., INC., AND NATIONAL STEEL CORP., PLAINTIFFS *v.* UNITED STATES, DEFENDANT, AND USINAS SIDERÚRGICAS DE MINAS GERAIS S/A, COMPANHIA SIDERÚRGICA PAULISTA, AND COMPANHIA SIDERÚRGICA NACIONAL, DEFENDANT-INTERVENORS

Court No. 99-08-00525

[Determination of U.S. Department of Commerce's International Trade Administration on countervailing duty suspension agreement remanded for action consistent with this opinion.]

(Decided August 3, 2001)

Skadden, Arps, Slate, Meagher & Flom LLP (Robert E. Lighthizer, John J. Mangan, Ellen J. Schneider, Stephen J. Narkin, and *Worth S. Anderson)* and *Dewey Ballantine LLP (Alan Wm. Wolff* and *Michael H. Stein),* for Plaintiffs.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Lucius B. Lau,* Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Terrence J. McCartin,* Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Willkie Farr & Gallagher (Christopher A. Dunn, Christopher S. Stokes, Robert L. LaFrankie, and *Karl von Schriltz),* for Defendant-Intervenors.

OPINION

RIDGWAY, *Judge:* This action challenges a July 1999 agreement between the U.S. Department of Commerce ("Commerce") and the Government of Brazil, suspending at the eleventh hour the investigation into alleged countervailable subsidies received by three Brazilian steel exporters ("Brazilian Exporters")[1] from the Brazilian Government. *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 38,797 (Dept. Commerce 1999) (suspension of countervailing duty investigation and entry of suspension agreement) (Public Administrative Record Document ("P.R. Doc.") No. 173) ("Suspension Determination" or "Suspension Agreement" or "Agreement").[2] That investigation was initiated at the behest of, among others, the plaintiff domestic steel producers here ("Domestic Producers").[3] *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 63 Fed. Reg. 56,623 (Dep't Commerce 1998) (initiation of countervailing duty investigation) (P.R. Doc. No. 33).

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[1] The three Brazilian exporters who were the respondents in the underlying countervailing duty investigation—Usinas Siderurgicas de Minas Gerais S/A ("USIMINAS"), Companhia Siderurgica Paulista ("COSIPA"), and Companhia Siderurgica Nacional ("CSN")—are Defendant-Intervenors in this action.

[2] Adopting the convention used in the parties' briefs, citations to the Public Administrative Record are designated "P.R. Doc. No." followed by the number of the particular record as indicated under the handwritten "Doc. #" column in the administrative record filed with the Court. Certain documents inadvertently omitted from the original record filed were forwarded to the Court by letter dated March 23, 2000, and are here designated "Supp. P.R. Doc. No. ____." By letter dated April 27, 2000, additional documents were transmitted. Those documents are designated "Second Supp. P.R. Doc. No. ____."

[3] The Domestic Producers are Bethlehem Steel Corporation; U.S. Steel Group, a Unit of USX Corporation; Ispat Inland Inc.; LTV Steel Company, Inc; and National Steel Corporation. The Domestic Producers constitute roughly half of the industry overall, and well over half of the industry that participated in the underlying investigation. *See Bethlehem Steel Corp. v. United States,* ___ CIT ___, Slip Op. 01-65 at 2 n.3 (May 29, 2001).

As the Domestic Producers have observed, a suspension agreement is essentially a unique form of settlement agreement: a settlement agreement to which the complainant—that is, the domestic industry—is not a signatory. Tr. at 5;[4] *see also* 125 Cong. Rec. 20,168 (1979).[5] While Congress has authorized Commerce to enter into suspension agreements, Congress has emphasized the limited circumstances in which such agreements are appropriate, and has established rigorous procedural safeguards to ensure that they are not abused to the detriment of domestic interests.[6]

The law on suspension agreements requires, among other things, that Commerce afford the domestic industry the opportunity to review and comment on any proposed agreement. 19 U.S.C. § 1671c(e) (1994). The Domestic Producers here argue that "there is no indication that anyone at the Department read [their comments]. Indeed, there is substantial evidence that they did not." *See* Plaintiffs' Reply Brief in Support of Motion for Judgment Under Rule 56.2 ("Reply Memo") at 35. The Domestic Producers further assert that, under the facts of this case, Commerce cannot make the substantive determinations required to justify the Suspension Agreement. *Id. passim.*

Pending before the Court is Plaintiffs' Motion for Judgment Upon the Agency Record (filed under USCIT Rule 56.2), in which the Domestic Producers seek an order directing Commerce to terminate the Suspension Agreement and to issue a countervailing duty order on the subject merchandise. Plaintiffs' motion is opposed by Defendant, the United States ("the Government"), as well as the Brazilian Exporters, who argue that Commerce's determination to suspend the countervailing duty investigation should be sustained in all respects.[7]

Plaintiffs' motion is granted in part. Whether or not Commerce read the comments filed by the Domestic Producers and other petitioners, the record indicates that those comments were not given adequate consideration. Accordingly, for the reasons discussed more fully below, this case is remanded to the Department of Commerce to enable it to comply with the applicable notice, comment and consultation requirements of the statute, and to reconsider its determination in light of all comments and consultation.[8]

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[4] *See* Transcript of oral argument on Plaintiffs' Motion for Judgment on the Agency Record (cited as "Tr. at ___").

[5] In a colloquy immediately preceding the Senate vote on the Trade Agreements Act of 1979, Senator Heinz observed: "When the committee discussed this concept [of suspension agreements] there was some suggestion that it was analogous to settling a case out of court * * * In fact there is a major difference. In a suit any settlement is between plaintiff and defendant. In this bill any settlement is effectively between defendant and judge, a very different relationship, especially when the judge is not always neutral." 125 Cong. Rec. 20,168 (1979).

[6] *See* section I.A, *infra*.

[7] Two companion cases are also pending before the Court—Court No. 99–08–00524, in which the Domestic Producers challenge a suspension agreement in the parallel antidumping duty investigation, which was the subject of *Bethlehem Steel*, Slip Op. 01–65; and Court No. 99–08–00528, in which the Brazilian Exporters challenge Commerce's final affirmative countervailing duty determination in the investigation suspended by the agreement at issue here.

[8] Nothing herein should be read to assume the outcome on remand. While it is possible that, upon reconsideration, Commerce will once again conclude that suspension is justified and that the Suspension Agreement should remain unchanged, it is also conceivable that Commerce will determine that—while suspension is justified—some of the terms of the Agreement must be altered, or that Commerce will abandon the concept of a suspension agreement entirely.

I. BACKGROUND

A. THE SUSPENSION AGREEMENT STATUTE

The statutory provisions authorizing suspension agreements in countervailing duty cases were added to the Tariff Act of 1930 as part of the Trade Agreements Act of 1979 (the "Act"). Prior to the Act, the Secretary of the Treasury—who was then responsible for implementing the antidumping and countervailing duty laws—had the authority to waive the imposition of countervailing duties *after* an investigation was concluded, where the Secretary found that "adequate steps" had been taken to reduce substantially or eliminate the adverse effect of a "bounty or grant." S. Rep. No. 96–249 at 50–51 (1979), *reprinted in* 1979 U.S.C.C.A.N. 381 at 436–37. Domestic industries generally were highly critical of the Secretary's exercise of waiver authority. *See, e.g.*, 125 Cong. Rec. 20,161–62 (1979) (Memorandum of Ad Hoc Subsidies Coalition asserting, in relevant part, "5. Treasury Has Stretched the Authority of the Trade Act of 1974 With Regard to the Granting of Waivers").[9]

The suspension agreement provisions of the Act were adopted to impose "strict limits on discontinuing or suspending investigations pursuant to deals with foreign governments or producers." 125 Cong. Rec. 20,163 (1979). The provisions on suspension of countervailing duty investigations effected "a major change in * * * [the then-existing] law," eliminating waiver authority and instead "authorizing the suspension of investigations based on agreements with the exporters or the government of the country in which the subsidy practice is alleged to occur." H. Rep. No. 96–317 (1979) at 53.

In authorizing the use of suspension agreements in appropriate countervailing duty cases, Congress recognized their "importance * * * to both importers and domestic industry as a means of achieving the remedial purposes of the law in as short a time as possible and with a minimum expenditure of resources by all parties involved." H. Rep. No. 96–317 at 53. *Accord*, S. Rep. No. 96–249 at 54 (suspension agreements "permit rapid and pragmatic resolutions of countervailing duty cases").[10]

But Congress was equally mindful of the potential for abuse of suspension agreements. To ensure that such agreements are not entered into to the disadvantage of a petitioning domestic industry (for foreign policy or other political reasons), the statute is replete with stringent requirements that must be met before an agreement can be concluded. Congress emphasized that "the authority to suspend investigations [is

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[9] Legislative history is particularly instructive where, as here, Congress considered the statute at issue as "fast track" legislation. As a general rule, the "plain meaning" doctrine of statutory construction and its corollaries constrain resort to extrinsic aids in the interpretation and application of a statute, on the theory that the language of the statute as adopted expresses all that Congress intended to say on the subject. However, because legislators are precluded from amending the language of a "fast track" statute to clarify and amplify its meaning, its legislative history is entitled to special weight. *See Bethlehem Steel*, Slip Op. 01–65 at 6 n.9, and authorities cited there.

[10] *See also* H. Rep. No. 96–317 at 55, 65 (advantages of subsection (c) suspension agreements include "the expenses saved because of prompt settlement of a case" and "the certainty of prompt relief" in countervailing duty—as well as antidumping—cases); Statements of Administrative Action for Trade Agreements Act of 1979, H.R. Doc. No. 96–153, Part II at 402, *reprinted in* 1979 U.S.C.C.A.N. 665 at 675 (advantages of suspension agreements under 19 U.S.C. § 1671c(c) include "the value of settling the case quickly" and "the certainty of prompt relief").

to] be exercised within the carefully circumscribed limits" set forth in the law. H. Rep. No. 96–317 at 53–54; *see also* S. Rep. No. 96–249 at 54 (to ensure that suspension agreements are used only in those cases where they "serve[ ] the interest of the public and the domestic industry affected," agency authority to suspend investigations is "narrowly circumscribed"); 125 Cong. Rec. 20,168–69 (1979) (Senator Heinz's understanding that suspension agreements permitted only "under certain narrowly constrained circumstances" confirmed by bill managers Senators Ribicoff and Roth). Congress further cautioned that "suspension is an unusual action which should not become the normal means of disposing of [countervailing duty] cases." S. Rep. No. 96–249 at 54.

There are essentially two distinct types of suspension agreements in countervailing duty cases—so-called "subsection (b) agreements" and "subsection (c) agreements." Subsection (b) agreements eliminate or offset completely a countervailable subsidy, or cease exports of the subject merchandise. 19 U.S.C. § 1671c(b). In contrast, subsection (c) agreements do not cease exports; nor do they completely eliminate or offset countervailable subsidies. Rather, they eliminate only the exports' injurious effect. 19 U.S.C. § 1671c(c).

Prior to accepting either a subsection (b) or (c) agreement, Commerce must find both that "suspension of the investigation is in the public interest," and that "effective monitoring of the agreement by the United States is practicable." 19 U.S.C. § 1671c(d). Commerce also is required to notify petitioners of, and consult with them concerning, its intention to suspend the investigation. In addition, Commerce must provide petitioners with a copy of the proposed agreement, and accord them an opportunity to comment. 19 U.S.C. § 1671c(e).

But there are additional requirements for subsection (c) agreements. Because such agreements, by definition, allow some subsidy practices to continue, Congress restricted subsection (c) agreements to cases involving "extraordinary circumstances"—cases where the suspension of the investigation is more beneficial to the domestic industry than its continuation, and where the investigation is "complex." *See* S. Rep. No. 96–249 at 51 (discussing the extraordinary circumstances requirement set out in 19 U.S.C. § 1671c(c)(4)).

Moreover, while all subsection (c) agreements require findings of "extraordinary circumstances" and "complexity" (as discussed above), there are unique requirements for those subsection (c) agreements which are—like the Agreement at issue here—quantitative restriction agreements.[11] Specifically, the statute mandates that, in evaluating the public interest *vis-a-vis* such an agreement, Commerce must both (i) consult with potentially affected consuming industries, as well as potentially affected producers and workers in the domestic industry, and (ii) take into account the impact of such an agreement on U.S. consumers,

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[11] A quantitative restriction agreement is an agreement by a foreign government to limit the volume of imports of the merchandise at issue into the United States—that is, an agreement establishing a quota. *See* 19 U.S.C. § 1671c(c)(3).

the international economic interests of the United States, and the competitiveness of the domestic industry (in addition to any other necessary or appropriate factors). 19 U.S.C. § 1671c(d)(1).

As Congress intended, Commerce has invoked the suspension provisions of the trade laws only infrequently in both countervailing duty and antidumping investigations—at least until recently. Notably, prior to the suspensions of both the countervailing duty investigation at issue and the parallel antidumping investigation, Commerce had accepted only four other subsection (c) agreements, including both antidumping[12] and countervailing duty[13] cases. In each of those cases, Commerce sought—and obtained—the consent of the petitioners. *See* Reply Memo at 8 n.27 and authorities cited there.

B. The Facts of This Case

On September 30, 1998, the Domestic Producers who are plaintiffs here—among others[14]—petitioned Commerce and the International Trade Commission ("ITC"), seeking the imposition of countervailing duties on certain steel products from Brazil.[15] *See* Letter from Skadden/Schagrin/Dewey to Commerce and ITC, *and* enclosed Petition (Sept. 30, 1998) (P.R. Doc. No. 3). Specifically, the petition alleged that CSN, COSIPA and USIMINAS—Defendant-Intervenors here—received billions of dollars in equity infusions from the Government of Brazil, at a time when those companies were neither equity-worthy nor credit-worthy. *Id.* The petition was accepted, and the requested investigation was initiated on October 15, 1998.[16] *See* 63 Fed. Reg. 56,623.

One month later, the ITC notified Commerce of its preliminary determination, finding that "there [was] a reasonable indication that an industry in the United States [was] threatened with material injury by reason of imports" of the Brazilian steel. *See* Certain Hot-Rolled Steel Products From Brazil, Japan, and Russia, 63 Fed. Reg. 65,221 (ITC 1998) (preliminary injury determination in both countervailing duty investigation and parallel antidumping investigation). On February 12, 1999, Commerce made its preliminary determination, finding that countervailable subsidies indeed were being provided to the Brazilian Exporters. *See* Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 8313 (Dep't Commerce 1999) (pre-

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[12] *See* Potassium Chloride From Canada, 53 Fed. Reg. 1393 (Dep't Commerce 1988) (suspension of investigation and agreement); Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,618 (Dep't Commerce 1996) (suspension of investigation and agreement).

[13] *See* Steel Wire Rod From Trinidad and Tobago, 62 Fed. Reg. 54,960 (Dep't Commerce 1997) (suspension of investigation and agreement); Steel Wire Rod From Venezuela, 62 Fed. Reg. 54,966 (Dep't Commerce 1997) (suspension of investigation and agreement).

[14] The original petitioners also included California Steel Industries, Gallatin Steel Company, Geneva Steel, Gulf States Steel, Inc., IPSCO Steel Inc., Steel Dynamics, Weirton Steel Corporation, the Independent Steelworkers Union, and the United Steelworkers of America.

[15] The same day, the same petitioners filed a petition alleging that CSN, COSIPA and USIMINAS were dumping the same steel products that were the subject of the countervailing duty petition. The chronology of these two related investigations—which proceeded on parallel timetables and both resulted in suspension agreements—is detailed in *Bethlehem Steel*, Slip Op. 01-65 at 9–14 (concerning the suspension agreement in the antidumping case). While that chronology is not set forth here, the implications of the facts of this case can be fully appreciated only in the context of the facts of that case.

[16] On November 12, 1998, the petitioners alleged an additional subsidy practice. *See* Letter from Skadden Arps to Commerce (Nov. 12, 1998) (P.R. Doc. No. 42).

liminary affirmative countervailing duty determination) (P.R. Doc. No. 120).

On June 6, 1999—literally one month to the day before the statutory deadline for its final determination[17]—Commerce sent the Domestic Producers (among others) an initialed proposed agreement to suspend the countervailing duty investigation, requesting comments by June 28, 1999. *See* Letters from Commerce to Interested Parties (June 6, 1999) (requesting comments on enclosed Proposed Agreement) (Second Supp. P.R. Doc. No. 1) ("Letters from Commerce to Interested Parties" and "Proposed Agreement").

The following day—June 7—Commerce issued a news release announcing the Proposed Agreement (as well as a proposed suspension agreement in the parallel antidumping case). In that release, Secretary of Commerce William M. Daley stated that, under the agreement at issue here, "imports [would] not resume until after October 1." *See Commerce Secretary William M. Daley Announces Tentative Agreements to End Dumping of Brazilian Steel in the U.S., at* http://www.ita.doc.gov/media/brazilsteel2.htm (June 7, 1999) ("Commerce June 7, 1999 News Release") (*cited in* Letter from Skadden/Dewey/Schagrin to Commerce at 26 n.53 (June 28, 1999) (P.R. Doc. No. 161) ("Petitioners' Comments")).

The Domestic Producers (jointly with other petitioners) filed timely comments on the Proposed Agreement. *See* Petitioners' Comments (June 28, 1999) (P.R. Doc. No. 161). Their lengthy submission detailed numerous substantive objections, in support of their argument that the Proposed Agreement failed to meet the requirements of the suspension agreement statute. *Id.* at 1–26. In addition, the petitioners' comments identified a number of drafting errors and inaccuracies in the Proposed Agreement. *Id.* at 26–51. For example, the comments pointed out that the Proposed Agreement invoked *both* subsection (b) *and* subsection (c) of the statute (*see id.* at 2), even though the Proposed Agreement was plainly a subsection (c) agreement. In addition, the comments noted that the Proposed Agreement failed to include the ban on imports through September 30, 1999, which the Secretary of Commerce had referred to in his June 7 statement. *Id.* at 23 n.49, 26–27 n.53.

A few days later, on July 6, 1999—the deadline for its final determination in the countervailing duty investigation—Commerce entered into a

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[17] Commerce's timing in this case—as with the suspension agreement in the antidumping investigation at issue in *Bethlehem Steel*, Slip Op. 01–65—truly came "down to the wire."

The suspension agreement statute requires that Commerce notify petitioners of its intent to suspend an investigation at least 30 days in advance of the suspension. 19 U.S.C. § 1671c(e)(1). And a suspension agreement can be completed no later than the date of Commerce's final determination. *See, e.g.*, S. Rep. No. 96–249 at 15 (suspension to occur "prior to a final determination by the administering authority [*i.e.*, Commerce]"). In this case, the deadline for Commerce's final determination already had been extended several times, and could not be extended past July 6, 1999. *See* 19 U.S.C. §§ 1671d(a)(1), 1673d *et seq.*; 19 C.F.R. § 351.210(b)(2). *See also* Postponement of [Final Determination of Antidumping and Countervailing Duty Investigations of Hot-Rolled Flat-Rolled Carbon Quality Steel From Brazil, 64 Fed. Reg. 9474 (Dep't Commerce 1999); Postponement of Final Determination of Antidumping and Countervailing Duty Investigations of Hot-Rolled Flat-Rolled Carbon-Quality Steel From Brazil, 64 Fed. Reg. 24,321 (Dep't Commerce 1999).

In short, under the suspension agreement statute, June 6 was *the last possible day* on which Commerce could notify the petitioners of the Proposed Agreement. Commerce's existing regulations are considerably more stringent. *See* n.24, *infra*.

final agreement suspending that investigation. *See* Suspension Determination/Suspension Agreement, 64 Fed. Reg. 38,797. The final Agreement differed from the Proposed Agreement in only one respect: It incorporated the quota level of zero (effectively banning imports) for the period through September 30, 1999, which had been first announced by the Secretary of Commerce in his statement on the Proposed Agreement one month earlier. *See* Agreement, 64 Fed. Reg. at 38,798; Commerce June 7, 1999 News Release.

Concurrent with its execution and issuance of the final Suspension Agreement, Commerce separately circulated two memoranda setting forth the bases for the determinations supporting its decision to suspend both the countervailing duty investigation and the antidumping investigation. *See* Memoranda from ITA Office of Policy to Ass't Sec. for Import Administration (July 6, 1999) (addressing, respectively, the existence of extraordinary circumstances, and the public interest) (Supp. P.R. Doc. Nos. 1 and 2) ("Extraordinary Circumstances Memo" and "Public Interest Memo").

That same day, Commerce also issued its final affirmative determination in the underlying countervailing duty investigation.[18] Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Brazil, 64 Fed. Reg. 38,742 (Dep't Commerce 1999) (final affirmative countervailing duty determination) (P.R. Doc. No. 172). Commerce determined net subsidy rates of 6.35% for CSN, 9.67% for USIMINAS/COSIPA, and 7.81% for all others. *Id.*

The ITC's final determination—issued August 24, 1999—confirmed its affirmative preliminary finding on material injury. Certain Hot-Rolled Steel Products From Brazil and Russia, 64 Fed. Reg. 46,951 (ITC 1999) (final injury determinations in antidumping and countervailing duty investigations).

As a result of the Suspension Agreement, no countervailing duty order has issued in this case. Moreover, in the absence of a request for ITC review of Commerce's determination that the Agreement eliminated the injurious effects of imports, the suspension of liquidation of the goods at issue terminated twenty days after notice of suspension agreement was published in the Federal Register.

II. Jurisdiction and Standard of Review

Jurisdiction in this matter is predicated on 28 U.S.C. § 1581(c) (1994). Commerce's decision to suspend the countervailing duty investigation at issue is reviewable pursuant to 19 U.S.C. § 1516a(a)(2)(B)(iv) (1994), and must be sustained unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B) (1994).

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[18] A few days earlier, the petitioners in the countervailing duty proceeding had requested that the investigation be continued in the event that "the Department [should] accept an agreement to suspend the investigation on July 6th." *See* Letter from Skadden/Dewey/Schagrin to Commerce (July 2, 1999) (P.R. Doc. No. 162).

III. THE REQUIREMENTS FOR SUBSECTION (b) AGREEMENTS

The Suspension Agreement states on its face that it was concluded "[p]ursuant to Section 704(b) and (c) of the Tariff Act of 1930, as amended"—that is, pursuant to *19 U.S.C. § 1671c(b)*, as well as 19 U.S.C. § 1671c(c). Agreement, 64 Fed. Reg. at 38,798 n.1. In contrast, the Suspension Determination invokes only subsection (c). 64 Fed. Reg. at 38,797. In its brief, the Government speculates that the Suspension Agreement's reference to subsection (b) was "mere inadvertence," confirms that the investigation was suspended based on subsection (c), and argues that—under the circumstances—the Court should decline to consider whether the Suspension Agreement and the underlying Suspension Determination would pass muster under subsection (b), because no live case or controversy is presented. Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record ("Defendant's Memo") at 25–29.

As the Domestic Producers concede, a Suspension Determination and Agreement need only meet the requirements of *either* subsection (b) or subsection (c). *See* Plaintiffs' Brief in Support of Motion for Judgment Under Rule 56.2 ("Plaintiffs' Memo") at 21 (Suspension Agreement must fulfill "the provisions of Section 704(b) or Section 704(c)"). Moreover, all parties agree that the investigation was suspended under subsection (c). *See* Defendant-Intervenors' Memorandum of Points and Authorities ("Defendant-Intervenors' Memo") at 9; Reply Memo at 2 n.3. Accordingly, the Domestic Producers' arguments concerning subsection (b) are moot. *See* Plaintiffs' Memo at 22–28 (arguing that Suspension Agreement and underlying Suspension Determination do not meet standards of subsection (b)).

When Commerce admits that it has made clerical errors, it should be given the opportunity to correct its mistakes. *See, e.g., Gilmore Steel Corp. v. United States,* 7 CIT 219, 223, 585 F. Supp. 670, 674, (1984). Even if the ultimate result would not be affected, it is appropriate to direct Commerce to correct errors if remand is otherwise necessary. *Federal-Mogul Corp. v. United States,* 18 CIT 1168, 1172, 872 F. Supp. 1011, 1014 (1994) (*citing Brother Indus., Ltd. v. United States,* 15 CIT 332, 346, 771 F. Supp. 374, 388 (1991)).

As discussed below, the Suspension Agreement and Commerce's underlying Suspension Determination were not in accordance with law. *See* section IV.A, *infra*. Because the case is being remanded to Commerce in any event, it is appropriate to direct Commerce to correct clerical errors at that time. *See Brother Indus.,* 15 CIT at 346, 771 F. Supp. at 388. Therefore, on remand, Commerce shall correct its error and clarify that the suspension of the investigation was based solely on subsection (c), by revising the Suspension Agreement to eliminate all references to 19 U.S.C. § 1671c(b).

IV. THE REQUIREMENTS FOR SUBSECTION (c) AGREEMENTS

As discussed above (*see* section III), all parties agree that—notwithstanding the Agreement's reference to subsection (b)—the investiga-

tion at issue actually was suspended under subsection (c), *i.e.*, 19 U.S.C. § 1671c(c). The Domestic Producers challenge virtually every aspect of that suspension, arguing (a) that Commerce failed to comply with the notice, comment and consultation requirements of the suspension agreement statute; (b) that effective monitoring of the Agreement is not practicable; (c) that there are no "extraordinary circumstances" in this case (*i.e.*, that the Agreement is not more beneficial to the domestic industry than continuation of the investigation,[19] and that the investigation was not complex); and (d) that the Agreement does not serve the public interest.

A. Notice, Comment and Consultation

The Domestic Producers argue that Commerce failed to comply with the notice, comment and consultation requirements of the suspension agreement statute, asserting that Commerce disregarded the petitioners' written comments on the Proposed Agreement and failed to "consult meaningfully" with them. *See generally* Plaintiffs' Memo at 51–53; Reply Memo at 34–37.

The notice, comment and consultation requirements mandate that, before entering into a suspension agreement, Commerce must:

> (1) notify the petitioner of, and consult with the petitioner concerning, its intention to suspend the investigation * * * not less than 30 days before the date on which it suspends the investigation,
>
> (2) provide a copy of the proposed agreement to the petitioner * * * together with an explanation of how the agreement will be carried out and enforced (including any action required of foreign governments), and of how the agreement will meet the requirements of subsections (b) and (d) or (c) and (d) of [the statute], and
>
> (3) permit all interested parties * * * to submit comments and information for the record before the date on which notice of suspension of the investigation is published
>
> * * * * * * *

19 U.S.C. § 1671c(e).[20] The legislative history of the statute highlights the importance of those provisions, emphasizing that "the requirement that the petitioner be consulted will not be met by pro forma communications. Complete disclosure and discussion is required." S. Rep. No. 96–249 at 54.

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[19] Although the statute speaks of weighing the benefits of a suspension agreement against the benefits of "continuation of the investigation" (*see* 19 U.S.C. § 1671c(c)(4)(A)(i)), the parties in this case have used *continuation of the investigation* and *entry of a countervailing duty order* interchangeably—perhaps due to the unusual procedural context of the Agreement at issue (*i.e.*, Commerce's issuance of the Suspension Determination and Agreement on the same day as its Final Determination). *See, e.g.*, Plaintiffs' Memo at 31–32 (proposed agreement "guaranteeing unfairly-traded imports a share of the U.S. market" not "more advantageous to the domestic industry than the relief from such imports *under an order*") (emphasis supplied); Defendant's Memo at 29–30 ("Commerce found that * * * the agreement provides greater relief and certainty *than a countervailing duty order*") (paraphrasing Extraordinary Circumstances Memo, which also refers to an order) (emphasis supplied); Defendant-Intervenors' Memo at 17 ("[t]aken together, these two Agreements [the Agreement at issue here and the suspension agreement in the related antidumping case] provide numerous protections that are more beneficial to the domestic industry than would be the case *if the CVD order were imposed*") (emphasis supplied).

[20] In addition to the consultation requirements of 19 U.S.C. § 1671c(e) (which govern all suspension agreements under both subsections (b) and (c)), there are additional consultation requirements which apply to quantitative restriction agreements such as the Suspension Agreement at issue here. *See* 19 U.S.C. § 1671c(d)(1).

The Government maintains that Commerce complied fully with all applicable notice, comment and consultation requirements. In support of that claim, the Government notes that petitioners were provided with a copy of the Proposed Agreement and accorded an opportunity to comment on it—facts which are not in dispute. Defendant's Memo at 57. The Government also points to the Suspension Determination, which states that "[t]he Department consulted with the parties to the proceeding and has considered their positions with respect to the proposed suspension agreement" (64 Fed. Reg. at 38,797),[21] and to the Public Interest Memorandum, which asserts that "the Department has consulted with parties affected" by the Suspension Agreement and that "the Department consulted extensively with domestic producers and unions, explaining what the [countervailing duty and antidumping suspension] Agreements will do, how they will work, and how they will be enforced" (Supp. P.R. Doc. No. 2).[22] Defendant's Memo at 57; Tr. at 42. Apart from those conclusory statements, however, there is no affirmative record evidence to indicate that Commerce even reviewed—much less considered or responded to—the petitioners' written comments.[23]

The Government and the Brazilian Exporters nevertheless argue that Commerce's statements on the record must be presumed to be the

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[21] While the Government's brief actually states that Commerce "met several times" with petitioners "regarding its intention to suspend the investigation" (Defendant's Memo at 57; *see also* Defendant-Intervenors' Memo at 6), the only record evidence cited to support that assertion is the Suspension Determination, which states simply that the petitioners were "consulted." 64 Fed. Reg. at 38,797. The Suspension Determination does not quantify the extent of consultation in any way; nor does it indicate whether that consultation occurred in face-to-face meetings or some other fashion. *Id.*; *see generally* Tr. at 47–49 (Government counsel discusses extent and nature of consultation required).

According to the Domestic Producers, "[t]he Department did inform the Petitioners several times that it was determined to suspend the investigation regardless of whether Petitioners objected. However, the Department never consulted with the Petitioners regarding the details of the Agreement, as opposed to the concept of suspending the investigation. Petitioners had to rely on their written comments to demonstrate the Agreement's unlawful provisions." Reply Memo at 37 n.124.

[22] In addition, the Brazilian Exporters point to Commerce's cover letter to petitioners, transmitting the Proposed Agreement. In that letter, the Assistant Secretary of Commerce states that he "will instruct [his] staff to consult with potentially affected consuming industries and potentially affected producers and workers in the domestic industry * * *." Defendant-Intervenors' Memo at 52 (*citing* Letters from Commerce to Interested Parties (June 6, 1999) (Second Supp. P.R. Doc. No. 1) at 2).

[23] The Domestic Producers intimate that Commerce is obligated to provide specific, written responses to petitioners' comments. Plaintiffs' Memo at 51–52; Reply Memo at 35. But the authorities they cite do not necessarily compel that conclusion.

In support of their argument, the Domestic Producers rely heavily on conference materials prepared by Commerce personnel, which state that petitioners' comments on a proposed suspension agreement "are formal, on-the-record comments which that Department will address, through changes to the initialed suspension agreement and/or through written responses in a memorandum prepared simultaneously with the final suspension agreement." Mark A. Barnett and Melissa G. Skinner, *Suspension of Antidumping and Countervailing Duty Investigations*, in *The Commerce Department Speaks on International Trade & Investment* 995, 1002 (Practising Law Institute 1998), cited in Plaintiffs' Memo at 52 *and* Reply Memo at 35 n.117. *See also* Tr. at 28–29.

However, as the Government notes (and, indeed, the Domestic Producers concede), the Barnett/Skinner paper was prepared by Commerce personnel in their individual capacities, and not as a statement of official agency policy. Tr. at 28, 38–39. There is no indication that the position set forth in the paper has ever been formally adopted by Commerce.

Nor is it clear that the absence of a written response to the petitioners' comments is a departure from Commerce's normal practice in cases of this type. Indeed, assuming *arguendo* that the low number of subsection (c) agreements prior to this one can be said to establish a practice (*see* n.37, *infra*), it appears that Commerce's uniform practice—in both antidumping duty and countervailing duty investigations—has been *not* to respond to petitioners' comments. *See, e.g.*, Potassium Chloride From Canada, 53 Fed. Reg. 1393 (Dep't Commerce 1988); Fresh Tomatoes From Mexico, 61 Fed. Reg. 56,618 (Dep't Commerce 1996); Steel Wire Rod From Trinidad and Tobago, 62 Fed. Reg. 54,960 (Dep't Commerce 1997); Steel Wire Rod From Venezuela, 62 Fed. Reg. 54,966 (Dep't Commerce 1997). Of course, as discussed above (*see* section I.A, *supra*), in the case of all prior subsection (c) agreements, Commerce sought and obtained the petitioners' consent. It is thus possible that the petitioners in those cases filed no substantive comments for Commerce to answer.

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truth. Tr. at 54–55; Defendant-Intervenors' Memo at 52. According to the Brazilian Exporters:

> If Plaintiffs are somehow to accuse the Department of not fulfilling [its notice, comment and consultation requirements], * * * they must provide proof to support their claim. * * * The fact that the Department did not revise the Agreement in accordance with Plaintiffs' desires does not, *vel non*, demonstrate that the Department did not consider these comments. It simply demonstrates that the Department chose not to incorporate them.

Defendant-Intervenors' Memo at 52.

As the Government notes, "[a]bsent some showing to the contrary, the agency is presumed to have considered all of the evidence of record." Defendant's Memo at 58, *citing Hoogovens Staal BV v. United States*, 93 F. Supp. 2d 1303, 1307 (Ct. Int'l Trade 2000), *appeals docketed*, Nos. 00–1432, –1433 (Fed. Cir. June 28, 2000). However, that presumption is rebuttable—and, indeed, it is rebutted by the evidence in this case.

The Suspension Agreement itself belies any claim that the Government considered the petitioners' written comments on the Proposed Agreement. Those comments not only detailed the petitioners' substantive objections to suspension of the investigation, but also pointed out a number of drafting errors and inaccuracies in the Proposed Agreement. *See* Petitioners' Comments *passim*.

A prime example is the Suspension Agreement's erroneous reference to subsection (b), discussed in section III above, which was also present in the Proposed Agreement. *Compare* Suspension Agreement, 64 Fed. Reg. at 38,798 n.1, *with* Proposed Agreement at 1 n.1. While the Government now postulates that the existence of that mistake in the final Suspension Agreement is attributable to "mere inadvertence" (Defendant's Memo at 27), the Proposed Agreement's erroneous reference to subsection (b) could not possibly have escaped the notice of anyone reading the petitioners' written comments. The first twelve pages of those comments were devoted exclusively to an in-depth analysis of why the

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Commerce's practice in the case of subsection (b) agreements depends on whether the investigation at issue is a countervailing duty investigation or an antidumping duty investigation. When Commerce enters into a subsection (b) agreement in a countervailing duty case, it typically publishes written responses to petitioners' comments. *See, e.g.*, Steel Wire Rope From South Africa, 47 Fed. Reg. 54,130 (Dep't Commerce 1982); Galvanized Steel Wire Strand From South Africa, 48 Fed. Reg. 19,451 (Dep't Commerce 1983); Steel Pipe and Tube Products From South Africa, 48 Fed. Reg. 24,407 (Dep't Commerce 1983); Certain Textile Mill Products From Thailand, 50 Fed. Reg. 9832 (Dep't Commerce 1985); Iron Ore Pellets From Brazil, 50 Fed. Reg. 24,265 (Dep't Commerce 1985); Miniature Carnations from Columbia, 52 Fed. Reg. 1353 (Dep't Commerce 1987); Certain Fresh Cut Flowers from Costa Rica, 52 Fed. Reg. 1356 (Dep't Commerce 1987).

In contrast, when Commerce enters into a subsection (b) agreement in an antidumping duty case, it does not respond to petitioners' comments. *See, e.g.*, Erasable Programmable Read Only Memory Semiconductors From Japan, 51 Fed. Reg. 28,253 (Dep't Commerce 1986); Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, 51 Fed. Reg. 28,396 (Dep't Commerce 1986); Gray Portland Cement and Clinker From Venezuela, 57 Fed. Reg. 6706 (Dep't Commerce 1992); Certain Portable Electric Typewriters From Singapore, 58 Fed. Reg. 39,786 (Dep't Commerce 1993); Color Negative Photographic Paper (CNPP) and Chemical Components Thereof From the Netherlands, 59 Fed. Reg. 43,539 (Dep't Commerce 1994); Sodium Azide From Japan, 62 Fed. Reg. 973 (Dep't Commerce 1997); Certain Cut-to-Length Carbon Steel Plate From South Africa, 62 Fed. Reg. 61,751 (Dep't Commerce 1997); Steel Wire Rod From Venezuela, 63 Fed. Reg. 8948 (Dep't Commerce 1998).

But even if Commerce is not obligated to provide specific, written responses to petitioners' comments, it must articulate its rationale with sufficient clarity to enable a court to "satisfy itself that the agency exercised a *reasoned* discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." *See Greater Boston Television Corp. v. Federal Communications Comm'n*, 444 F.2d 841, 850 (D.C. Cir. 1971) (emphasis supplied).

Proposed Agreement did not satisfy the statutory requirements of subsection (b). *See* Petitioners' Comments at 1–12.

As proof that Commerce in fact did consider the petitioners' written comments,[24] the Government points to the only difference between the Proposed Agreement and the final Suspension Agreement: The provision establishing a quota level of zero for the interim period (from July 19, 1999—the effective date of the Suspension Agreement—through October 1, 1999), which was missing from the Proposed Agreement and was raised in the petitioners' written comments. Defendant's Memo at 58 *and* Tr. at 50–53; Petitioners' Comments at 23–24. *Compare* Proposed Agreement *with* Agreement, Part IV, 64 Fed. Reg. at 38,798. But, in the June 7, 1999 news release announcing the Proposed Agreements in both the countervailing duty and antidumping duty cases, the Secretary of Commerce stated that, under the agreement at issue here, "imports [would] not resume until after October 1." *See* Commerce June 7, 1999 News Release. Thus, the Suspension Agreement's provision establishing the quota for the interim period was not inspired by the petitioners' comments; its omission from the Proposed Agreement was simply a drafting or clerical error.

The Government concedes that Commerce intended from the start to include a quota level for the interim period in the agreement, but posits that it was the petitioners' written comments that brought the omission in the Proposed Agreement to Commerce's attention and ensured the provision's inclusion in the final Suspension Agreement. Defendant's Memo at 58; Tr. at 50–51. However, the Government's position is mere speculation. There is no evidence on the record (such as an agency decision memorandum) to support the Government's claim of "cause and effect"; that is, there is nothing to indicate that the change between the Proposed Agreement and the final Agreement was made in response to the petitioners' comments. And it is difficult to imagine that—had Commerce actually considered the petitioners' comments—it would have corrected only one of the numerous drafting and clerical errors that the petitioners identified, and ignored all the others.[25]

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[24] At oral argument, counsel for the Government cited the press of time as the reason why Commerce's Suspension Determination did not respond to the petitioners' written comments and why Commerce did not engage in greater consultation. *See generally* Tr. at 42–44. However, as discussed above, Commerce in fact has made a practice of responding to petitioners' comments on suspension agreements in *some* contexts. *See* n.23, *supra*. To the extent that the time pressure on Commerce personnel considering the Suspension Agreement here may have been greater than in other cases (because of the imminent, firm deadline for their issuance of Commerce's Final Determination), it suffices to note that that dilemma was of Commerce's own making. *See* n.17, *supra* (explaining how Commerce's timing here "came down to the wire"). No doubt the tandem tasks of both finalizing the Final Determination and determining whether to suspend the investigation in fact did tax Commerce personnel to the limit.

Indeed, in 1997, Commerce revised its regulations to significantly advance the deadlines for initialing and signing suspension agreements to avoid precisely this dilemma—the "enormous burden on the parties and on the Department" inherent in the simultaneous consideration of a suspension agreement and preparation of a final determination. *See* 61 Fed. Reg. 7308, 7315 (1996); 62 Fed. Reg. 27,296, 27,313 (1997). Under those regulations, a copy of any proposed countervailing duty suspension agreement must be forwarded to petitioners no later than 15 days after Commerce's preliminary determination, and Commerce must accept or reject a final agreement no later than 45 to 60 days after the preliminary determination (depending on the circumstances). *See* 19 C.F.R. §§ 351.208(f)(1)(ii), 351.208(f)(2)(i)(B), 351.208(g)(1). The parties' briefs do not disclose why that regulatory timeline was not followed here.

[25] For example, in addition to the Proposed Agreement's erroneous reference to subsection (b), the petitioners' written comments also highlighted its inclusion of two sections numbered I.D, and its erroneous definition of "Hot-Rolled Steel" by reference to "Appendix II" (when the definition actually appears in Appendix I). Petitioners' Comments at 34. Yet none of these other drafting or clerical errors were corrected in the final Agreement.

At oral argument, counsel for the Government acknowledged that Commerce is obligated not only to solicit the petitioners' comments, but also to consider them. Tr. at 44–46. Commerce's failure in this case to correct in the final Suspension Agreement even the drafting and clerical errors identified by the petitioners is compelling evidence that Commerce failed to give appropriate consideration to the petitioners' written comments.

Due to Commerce's failure to comply with the notice, comment and consultation requirements of the suspension agreement statute, any "substantial evidence" review of Commerce's factual findings would be premature at this time. Even as to the legal issues presented, the considerations of judicial economy and deference to agency autonomy and expertise that undergird the related doctrines of exhaustion and ripeness counsel remand here.

Remand will afford Commerce to consider the Domestic Producers' comments, find facts, apply its expertise to the record, articulate its interpretation of the statute, and explain the bases for its action. Remand also will protect agency autonomy, and allow Commerce to exercise the discretion granted it by Congress. Finally, by affording Commerce an opportunity to correct any errors it may have made, remand conceivably may obviate entirely the need for further judicial review. *See* n.8, *supra*. *See generally* 2 K. Davis & R. Pierce, Jr., *Administrative Law Treatise* §§ 15.2 (*citing McKart v. United States*, 395 U.S. 185, 193–95 (1969)), 15.12 (3d ed. 1994).

Accordingly, for the reasons set forth above, this matter is remanded to Commerce, so that it may reconsider its Suspension Determination, giving due consideration to *all* of the petitioners' comments—the substantive ones as well as those identifying drafting or clerical errors, and so that it may undertake any further consultation that may be appropriate.[26]

B. The Practicability of Effective Monitoring

The statute permits suspension agreements only where "effective monitoring of the agreement by the United States is practicable." 19 U.S.C. § 1671c(d)(1)(B). The statute's legislative history underscores the importance of effective monitoring provisions:

> The committee intends that no agreement be accepted unless it can be effectively monitored by the United States. This will require establishment of procedures under which entries of merchandise covered by an agreement can be reviewed by the authority and by

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[26] As discussed above, 19 U.S.C. § 1671c(e) imposes on Commerce three notice, comment and consultation requirements. In addition to (i) affording petitioners notice of and an opportunity to comment on a proposed suspension agreement and (ii) explaining to petitioners "how the agreement will be carried out and enforced, and * * * how the agreement will meet [the applicable requirements of the statute]," Commerce also must (iii) "consult" with petitioners "concerning [ ] its intention to suspend the investigation." While the Domestic Producers broadly assert that Commerce failed to "consult meaningfully" with the petitioners (Plaintiffs' Memo at 53), their briefs to date have focused primarily on the extent of Commerce's consideration of its written comments on the Proposed Agreement. *But see, e.g.*, Reply Memo at 37 n.124 (asserting that "Commerce never consulted with the Petitioners regarding the details of the Agreement, as opposed to the concept of suspending the investigation"). Thus, it suffices here to note that the consultation requirement of 19 U.S.C. § 1671c(e)—like that of 19 U.S.C. § 1671c(d)(1)—is an obligation separate and distinct from the statute's notice and comment requirements. There is no need at this point to reach the issue of the nature, scope and extent of the consultation mandated by the statute.

> interested parties. Adequate staff and resources must be allocated for monitoring to insure that relief under the agreement occurs.

S. Rep. No. 96–249 at 54.

The Domestic Producers attack the monitoring provisions of the Agreement on three grounds. Their first complaint is the absence of any requirement that the Brazilian Government notify Commerce of its bestowal of *domestic* subsidies—the subsidy practice at issue in the underlying investigation. Plaintiffs' Memo at 49.

The Brazilian Exporters counter that there is no need for such a provision, because the Brazilian companies at issue in the investigation have now been "privatized." Defendant-Intervenors' Memo at 47–48. The Brazilian Exporters reason that, in order to make an equity infusion into one of those companies now, the Brazilian Government would have to obtain an equity position from a current private owner—at market value. *Id.* at 48. The Brazilian Exporters therefore conclude that it is a "practical impossiblity" for the Brazilian Government to make countervailable "equity infusions."[27] *Id.*

As the Domestic Producers note, however, that is not necessarily true. Rather than purchasing existing shares from current private owners, the Brazilian Government could instead buy new shares issued by the company. *See* Reply Memo at 32. Such a purchase would indeed confer a subsidy if the Brazilian Government paid above market value prices for the new shares.

The defendant U.S. Government takes a different tack, contending in essence that any future domestic subsidies would be irrelevant to the Agreement. According to the Government, Commerce's obligation is to monitor compliance with the terms of the Agreement—and the Agreement only imposes export limits and prohibits export subsidies or import substitution subsidies. In short, the Government argues, because the Agreement does not prohibit the bestowal of domestic subsidies, Commerce is not obligated to monitor them.[28] Defendant's Memo at 52–53.

The Domestic Producers read Commerce's monitoring obligations more broadly, asserting that "Congress required monitoring of a suspension agreement in order to ensure compliance both with its own terms *and* with the terms of the statute." Reply Memo at 31 (*citing* H.R.

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[27] There appears to be some dispute as to the extent of the privatization. The Brazilian Exporters assert that "the Brazilian government either has no interest or a minor residual interest" in the Brazilian steel companies at issue. Defendant-Intervenors' Memo at 48. However, they cite no record evidence to support that claim. In contrast, the Domestic Producers contend that the Brazilian Government "still owns a significant part of COSIPA"—an assertion they support with a reference to the Brazilian Government's response to a questionnaire in the underlying countervailing duty investigation, which indicates that "[a]s of Dec. 31, 1997, the Federal Government owned 73.16% of COSIPA's preferred stock, or 16.8 percent of its total equity." Reply Memo at 31–32 n.105 (citations omitted). In any event, as the Domestic Producers note, "the [Government of Brazil] could renationalize [the Brazilian Exporters] if the Brazilian economy falters or fiscal policy changes." *Id.*

[28] The Government contends that, "[b]y suggesting that Commerce should have included a provision addressing the bestowal of domestic subsidies, [the Domestic Producers are] essentially making an argument that is applicable to a suspension agreement entered into pursuant to 19 U.S.C. § 1671c(b), where the objective is to eliminate the countervailable subsidy completely. In this case, however, Commerce entered into a different type of suspension agreement." Defendant's Memo at 52 n.31.

Rep. No. 96–317 at 55, 66).[29] The Domestic Producers note that the statute requires complete elimination of the injury from subsidized imports, *see* Reply Memo at 31 (*citing* 19 U.S.C. § 1671c(c)(1))—in this case, injury resulting from *domestic* subsidies. They therefore conclude that, since "[t]he provision of additional domestic subsidies would destroy the efficacy of the Agreement," the Agreement cannot be practicably monitored in the absence of provisions requiring notification of the bestowal of such subsidies. Reply Memo at 31.

The Domestic Producers' second critique of the Agreement is that it includes no "provisions preventing circumvention through the use of swaps or transshipment through third countries, even though such provisions have been included in other countervailing duty suspension agreements." Plaintiffs' Memo at 49–50.[30] Absent such provisions, the Domestic Producers assert that Commerce "will have no means to determine whether imports of the subject merchandise are exceeding the [Agreement's] quota" of 295,000 metric tons per year. *Id.* at 50; Agreement, Part IV, 64 Fed. Reg. at 38,798.

The Government and the Brazilian Exporters point to Part VI of the Agreement, entitled "Anticircumvention," asserting that it "contains very broad language that addresses all types of circumvention that might occur." *See* Defendant's Memo at 53–54; Defendant-Intervenors' Memo at 48–49 (*citing* Agreement, Part VI, 64 Fed. Reg. at 38,799–800). In particular, they note that the Agreement addresses transshipping by prohibiting Brazilian exporters from shipping steel "directly or indirectly" to the United States without an export license. Defendant-Intervenors' Memo at 48 (*citing* Agreement, Part VI.A, 64 Fed. Reg. at 38,799–800). In addition, they note that the Agreement prohibits "any payments to one party for hot-rolled steel delivered or *swapped* by another party." Defendant's Memo at 53–54; Defendant-Intervenors' Memo at 48–49 (*citing* Agreement, Part VI.B.4, 64 Fed. Reg. at 38,800) (emphasis supplied by Defendant-Intervenors).

But the Domestic Producers take little comfort in those provisions, noting that the Agreement provides only for the investigation of potential instances of anticircumvention *brought to the attention of Commerce*. Reply Memo at 32–33 *(citing* Agreement, Part VI, 64 Fed. Reg. at 38,799–800). The Domestic Producers assert that, as a practical matter, the only interested parties with access to the information required to detect transshipment or swapping are the Brazilian Exporters—and the Agreement does not obligate them to report it. Reply Memo at 33.

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[29] The Domestic Producers bolster their case by reference to the report of the House Ways and Means Committee, which states: "Effective administration of [the] section [concerning suspension of antidumping investigations] requires careful monitoring of any agreement to ensure compliance with the terms of the agreement *and the requirements of that section*." H.R. Rep. No. 96–317 at 66 (emphasis supplied). *See also id.* at 55 (discussion of monitoring requirements for agreements suspending antidumping investigations equally applicable to agreements suspending countervailing duty investigations).

[30] As examples of suspension agreements including provisions on transshipment and swapping, the Domestic Producers cite Steel Wire Rod From Venezuela, 62 Fed. Reg. 54,966, 54,970 (1997) (Agreement, Art. IV.E) and Steel Wire Rod From Trinidad and Tobago, 62 Fed. Reg. 54,960, 54,963–64 (1997) (Agreement, Art. IV.E). *See* Plaintiffs' Memo at 50 n.124.

The Domestic Producers' third challenge to the monitoring provisions of the Agreement goes to the definition of "violation." They note that Commerce's regulations define a violation as:

> * * * noncompliance with the terms of a suspension agreement caused by an act or omission of a signatory, except, *at the discretion of the Secretary*, an act or omission which is inadvertent or inconsequential.

Plaintiffs' Memo at 50 (*quoting* 19 C.F.R. § 351.209(e)) (emphasis supplied by Plaintiffs). The Domestic Producers point out that the Agreement makes two changes—an addition and a deletion—to the definition in Commerce's regulations.

First, the Agreement defines "violation" to exclude not only noncompliance that is inadvertent or inconsequential, but also noncompliance that "does not substantially frustrate" the purposes of the Agreement. *See* Agreement, Part I.J, 64 Fed. Reg. at 38,798. The Domestic Producers argue that *any* frustration of the purposes of the Agreement—whether substantial or not—must be deemed a violation, because "if the purpose is frustrated the Agreement will neither completely eliminate or offset the subsidies nor eliminate their injurious effects, as required by the statute." Plaintiffs' Memo at 50–51.

The Government and the Brazilian Exporters defend the Agreement's definition of "violation." The Brazilian Exporters argue generally that the Agreement "provides the Department with the necessary authority and discretion to determine and punish violations as it deems appropriate." Defendant-Intervenors' Memo at 49. The Government observes that the statute itself does not define "violation," and asserts that "nothing from the statute or legislative history indicates that Congress intended Commerce to require strict compliance with suspension agreements."[31] Defendant's Memo at 55. But the Government's main argument is that, since courts do not overturn agency action for harmless error, it should be equally permissible for an agency to overlook harmless error committed by a party to a suspension agreement. *Id.* at 55.

The Domestic Producers reject the Government's analogy. According to the Domestic Producers, errors are "inadvertent," and *harmless* errors are "inconsequential." Reply Memo at 34. Thus, they reason, harmless error is fully covered by the exclusions for inadvertence and inconsequential noncompliance that appear in both the regulations and the Agreement. *Id.* The Domestic Producers conclude that noncompliance that "does not substantially frustrate the purpose of the agreement" is perforce an exclusion above and beyond harmless error, and is not permitted by Commerce's own regulations. *Id.*

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[31] The Domestic Producers have not specifically challenged this broad claim by the Government. But it is rather at odds with the prevailing environment at the time the suspension agreement statute was enacted. Indeed, the legislative history of that statute as a whole reflects an undercurrent of Congressional concern about the potential for abuse of suspension agreements, and the importance of their vigorous enforcement. *See generally* section I.A, *supra*; *see also, e.g.*, H.R. Rep. No. 96–317 at 66 (discussing "Monitoring of agreement" and expressing concern that relief under a suspension agreement "not [be] undermined by inadequate enforcement").

The Domestic Producers also object to the omission of the phrase "at the discretion of the Secretary" from the Agreement's definition of "violation," expressing concern that the omission "suggests that it is no longer in [the Secretary's] sole discretion whether a violation is inadvertent or inconsequential." Plaintiffs' Memo at 51. But the Government contends that the Domestic Producers are reading too much into the omission, and that their fears are unfounded. According to the Government, the plain language of the Agreement makes it clear that Commerce retains the discretion to determine whether a violation has occurred. Defendant's Memo at 54–55 (*quoting* Agreement, Part X, 64 Fed. Reg. at 38,801: "[i]f the DOC determines that this Agreement is being or has been violated * * *").

Although the issue of the practicability of effective monitoring has been fully briefed before the Court, it is not yet ripe for judicial review. For the reasons discussed in section IV.A above, this case is being remanded to allow Commerce to reconsider the Suspension Agreement and the underlying Suspension Determination. On remand, Commerce will have the opportunity to articulate its interpretation of the monitoring provisions of the statute and to reconsider its determination, giving due consideration to all of the petitioners' comments—including those on the monitoring provisions of the Agreement—with the benefit of the further amplification and explication of the Domestic Producers' briefs before the Court.

C. Extraordinary Circumstances

Subsection (c) agreements are limited to cases involving "extraordinary circumstances"—that is, "circumstances in which—(i) suspension of an investigation will be more beneficial to the domestic industry than continuation of the investigation, and (ii) the investigation is complex." 19 U.S.C. §§ 1671c(c)(1), 1671c(c)(4)(A). The Domestic Producers contest both parts of Commerce's determination that extraordinary circumstances are present in this case.

1. Whether the Agreement Is More Beneficial to the Domestic Industry than Continuation of the Investigation

As a threshold matter, the Domestic Producers contend that the petitioners' consent is required for a subsection (c) agreement—that is, that the petitioning domestic industry wields "veto power" over suspension agreements such as the Agreement at issue here. Reply Memo at 3–9; Tr. at 15–19.[32] In short, the Domestic Producers claim that their opposition is, in and of itself, sufficient to defeat the Agreement. Reply Memo at 15. In support of that argument, the Domestic Producers invoke both the legislative history of the suspension agreement statute, and Com-

[32] The Government advances its own threshold argument—apparently contending that the Domestic Producers are effectively estopped from challenging Commerce's determination that the Agreement is more beneficial to the domestic industry than continuation of the investigation. *See* Tr. at 30–32, 56–57, 62. Specifically, the Government asserts that, if the Domestic Producers did not believe that the Agreement "eliminate[s] completely the injurious effects of [the relevant] exports to the United States," they should have petitioned the ITC under 19 U.S.C. § 1671c(h)(3) for review of that aspect of Commerce's Suspension Determination. Defendant's Memo at 43.

Continued

merce's past practice in the application of the statute. *See* Reply Memo at 3–9.

On its face, the language of the suspension agreement statute "entrust[s] the 'more beneficial' determination to Commerce, and * * * [does] not expressly accord the domestic industry a veto power." *Bethlehem Steel*, Slip Op. 01–65 at 36 (footnotes omitted). However, as the Domestic Producers emphasize, Senator Heinz observed in an orchestrated colloquy immediately preceding the Senate vote on the legislation that he "would find it very difficult to believe a judgment that the domestic industry would benefit more from a suspension agreement than a completed investigation if that industry had expressed its opposition to such an action." Reply Brief at 3 (*quoting* 125 Cong. Rec. 20,168 (1979)).[33]

While the Government and the Brazilian Exporters here seek to minimize the Senator's observation (Defendant-Intervenors' Memo at 21–22; Tr. at 37, 40, 66–67), the Domestic Producers point out that "the Department previously has not only given great weight to Senator Heinz' statement, but concluded that it requires securing the agreement of petitioners." Reply Brief at 6. Specifically, the Domestic Producers point to the "Powell Memorandum," prepared by Commerce's Chief Counsel for Import Administration in a 1992 antidumping investigation of uranium from the former Soviet Union.[34] *See* Reply Memo at 6–7. Outlining various options for settlement of that case and anticipating industry opposition to a subsection (c) agreement, the Powell Memorandum cited Senator Heinz's statement and cautioned that "[t]he legislative history of this ["more beneficial"] provision indicates that Congress arguably intended it to require that the domestic industry consent to this type of agreement." *See* Powell Memorandum (Reply Memo at Exhibit 1) at 1, 4. The Powell Memorandum therefore recommended in that case that Commerce enter into agreements under the special nonmarket economy ("NME") provisions of the suspension agreement statute, which do not include a "beneficiality" requirement. *Id.*

It is worth noting that the Government has not made this argument in the companion case, Court No. 99–08–00524, which challenges the suspension agreement in the related antidumping proceeding. Indeed, even in its brief in this case, the Government did not raise the point in either its introduction (not in its Statement Pursuant to Rule 56.2, not in its Statement of Facts, and not in its Summary of Argument) or in its discussion of the "beneficiality" requirement of the "extraordinary circumstances" criterion. *See* Defendant's Memo at 2–17, 29–32. The Government's brief presented the "exhaustion" argument only as part of its case on the "public interest" criterion—and then only in passing. *See* Defendant's Memo at 43. And neither the Brazilian Exporters nor the Domestic Producers addressed the point in their papers. *But see* Tr. at 27 (counsel for Domestic Producers responds to exhaustion argument).

Because this matter is being remanded for the reasons set forth in section IV.A above, there is no need now to reach the merits of the Government's argument on exhaustion. In the briefing that follows the filing of Commerce's determination on remand, all parties will have the opportunity to address the Government's argument in detail, focusing on, *inter alia*, the language of 19 U.S.C. § 1671c(h)(3), its legislative history, the underlying policy, and its relationship to and interaction with other relevant sections of the international trade laws.

[33] In the companion case challenging the suspension agreement in the related antidumping proceeding, the Government and the Brazilian Exporters made much of the fact that seven of the petitioning U.S. steel producers wrote a letter supporting certain aspects of that agreement. *See Bethlehem Steel*, Slip Op. 01–65 at 21 n.19, 35 n.30. In contrast, none of the petitioners here broke ranks.

[34] *See* Memorandum from Chief Counsel for Import Administration to Ass't Secretary for Import Administration, re: "Uranium Investigation: Legal Options For Settlement," Investigation A–461–801 (May 7, 1992) at 1, 4, *attached to* Reply Memo as Exhibit 1 ("Powell Memorandum").

The Executive Summary of the Powell Memorandum, in particular, reinforces the view that the consent of the domestic petitioners is required for a subsection (c) agreement:

> [M]ost options carry procedural requirements. These include: *securing the agreement of the domestic petitioner;* finding that the agreement is in the public interest as specifically defined by the statute; and ensuring that the agreement is effectively monitorable. Taking these difficulties into account, only the settlement option that Congress crafted specifically for nonmarket economies * * * appears capable of settling the investigation.

Powell Memorandum at 1 (*quoted in* Reply Memo at 7–8; emphasis supplied by Plaintiffs). Indeed, as the Powell Memorandum counseled, Commerce avoided the beneficiality requirement in the uranium case by entering into an NME suspension agreement. *See* Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine and Uzbekistan, 57 Fed. Reg. 49,220 (Dep't Commerce 1992) (suspension notice).[35]

Moreover, the Domestic Producers note, Commerce's prior practice is consistent with the Powell Memorandum. From the Powell Memorandum in 1992, up to the suspension agreements at issue in this case and in the companion antidumping case, Commerce sought and secured the consent of the domestic petitioners to every other subsection (c) agreement. Reply Memo at 8 n.27.[36] Accordingly, the Domestic Producers assert that "the legislative history, as well as the uniform and consistent practice of the Department, mandates that the Department secure the consent of the petitioners" before entering into a subsection (c) agreement such as the Agreement here. Reply Memo at 8–9.[37]

At a minimum, even if it does not accord petitioners the power to veto a proposed subsection (c) agreement, the "beneficiality" requirement constitutes a very high hurdle for Commerce where, as here, the Domestic Producers maintain that the Agreement is not "more beneficial" than an order.

As in the companion antidumping suspension agreement case, Commerce's "beneficiality" determination in this case rests on its findings that the Agreement provides greater relief and greater certainty than would an antidumping order. Defendant's Memo at 6–7, 29–30 (*citing* Extraordinary Circumstances Memo). In making those findings, Com-

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[35] To further bolster their argument that subsection (c) historically has been interpreted as requiring the consent of the domestic petitioners, the Domestic Producers point to a paper prepared (albeit in his personal capacity) by the current Chief Counsel for Import Administration. That paper states that agreements under the special NME provisions of the suspension agreement statute may be the only viable option for resolving antidumping investigations involving nonmarket economies because, *inter alia*, "it may be difficult to convince the petitioners to agree to a suspension agreement [under subsection (c)] that raises U.S. prices by less than the full amount of the preliminary margin." John D. McInerny, *Lessons of Uranium in The Commerce Department Speaks on International Trade & Investment* 157, 163 (Practising Law Institute 1994), *cited in* Reply Memo at 7 n.23.

[36] Of course, that the domestic petitioners in those cases did not oppose the subsection (c) agreements does not perforce mean that Commerce viewed their consent as a prerequisite.

[37] Commerce is required to follow prior "precedent" only if it represents a settled rule applied consistently over time. *See Coalition for Fair Atlantic Salmon Trade v. United States*, 101 F. Supp. 2d 821, 824 (Ct. Int'l Trade 2000). There is no need in this case to now decide whether the three prior subsection (c) agreements cited by the Domestic Producers can be said to constitute a longstanding practice. Moreover, even where an established practice exists, an agency may depart from that practice in certain circumstances, provided that the departure is adequately justified. *See Atchison, Topeka & Santa Fe Railway Co. v. Wichita Board of Trade*, 412 U.S. 800, 808 (1973).

merce relied solely on the analysis set out in its Public Interest Memorandum. *See* Extraordinary Circumstances Memorandum.

According to Commerce, the Agreement affords the Domestic Producers *greater relief* than a countervailing duty order because it protects them from "future exchange rate-driven surges of Brazilian hot-rolled steel." Defendant's Memo at 30 (*citing* Public Interest Memo). But the Government points to no record evidence to substantiate Commerce's premise—that exchange rate fluctuations were the cause of the surges of Brazilian steel. And, as the Domestic Producers observe, "the injury to the domestic industry in a countervailing duty case comes from the fact that the imports are subsidized, not from the fact that the exchange rate may fluctuate." Plaintiffs' Memo at 47. *See generally Bethlehem Steel*, Slip Op. 01–65 at 30–31.

The other asserted benefit, according to Commerce, is *greater certainty* for the domestic industry. Alluding to the "reference price" provision of the suspension agreement in the related antidumping proceeding,[38] Commerce emphasizes that U.S. producers will benefit from "a set level of relief that will remain in force over the life of the Agreements." Defendant's Memo at 30 (*citing* Public Interest Memo).[39] According to Commerce, "[t]his would not be the case under AD/CVD orders where import levels and prices could vary dramatically from period to period, depending upon a variety of factors that could affect dumping and subsidy rates found." Defendant's Memo at 30 (*citing* Public Interest Memo), 46.

At the outset, the Domestic Producers contest Commerce's asserted right to rely on the alleged benefits of the antidumping suspension agreement in evaluating this Agreement.[40] And they counter that, in any event, "it is unclear how a 'set level of relief' is more beneficial to U.S. producers than the *full* relief available from a countervailing duty order." Plaintiffs' Memo at 32 n.81, 46 (emphasis in the original).[41]

Further, as discussed in *Bethlehem Steel*, Slip Op. 01–65 at 31, certainty is not, in and of itself, a virtue; that is, certainty is not *always* better

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[38] Under the terms of the suspension agreement in the antidumping proceeding, the Brazilian Exporters are prohibited from exporting the steel at issue to the United States for less than the negotiated "reference price." *See generally Bethlehem Steel*, Slip Op. 01–65 at 11–12.

[39] *See also* Defendant-Intervenors' Memo at 16–19 (relying on provisions of antidumping suspension agreement, and asserting that the two agreements are "inextricably tied").

The Government did not brief the question whether, as a legal matter, Commerce is entitled to rely on the antidumping suspension agreement in making its "more beneficial" finding on the Agreement here. However, the Government clearly staked out its position on the issue vis-a-vis the "public interest" analysis, arguing that—at least in that context—"it was entirely proper for Commerce to consider the factual circumstances presented by the antidumping suspension agreement." Defendant's Memo at 50.

In any event, as the Government conceded in the companion case, it would have been preferable, for the sake of clarity, for Commerce to have prepared separate Extraordinary Circumstances Memoranda in the two cases. *See generally Bethlehem Steel*, Slip Op. 01–65 at 34–35 n.29. On remand, Commerce will have the opportunity to prepare a separate memorandum for this case.

[40] Parsing the language of the statute, the Domestic Producers assert that the law "does not allow the suspension to be made dependent on a *different* agreement in a *different* case concluded under a totally *different* section of the statute." Reply Memo at 13 (emphasis in the original). Moreover, they emphasize that the antidumping suspension agreement may be terminated or modified independently of the Agreement at issue here. *Id.* In addition, they contend that—assuming *arguendo* that the benefits of the two agreements should be considered together—then those benefits "should be compared to the effect of the combined subsidy rates and antidumping margins." *Id.* at 34. According to the Domestic Producers, "[s]uch enormous duties would surely lock Brazilian imports out of the U.S. market." *Id.*

[41] The Domestic Producers assert that the relief under the Agreement is "vastly inferior" to the relief under an order, because the Agreement "permits subsidized imports to enter the United States at levels significantly exceeding historical norms without paying countervailing duties." Plaintiffs' Memo at 31; Reply Memo at 15.

than uncertainty. Moreover, any suspension agreement will, by definition, produce certainty. Thus, if mere certainty suffices to make a suspension agreement "more beneficial" to the domestic industry than continuation of an investigation, a suspension agreement would be permissible in any countervailing duty proceeding. Clearly, that was not the intent of Congress. *See* S. Rep. No. 96–249 at 54 ("suspension is an unusual action which should not become the normal means of disposing of cases").

Subsection (c) agreements, in particular, are reserved for cases involving "extraordinary circumstances." 19 U.S.C. § 1671c(c)(4); S. Rep. No. 96–249 at 54 (subsection (c) agreements to be accepted only "very rarely"); H.R. Rep. No. 96–317 at 55 (extraordinary circumstances determination to "be made rarely and only upon a compelling showing"). In short, Commerce cannot logically rely on a fact that is true with respect to any investigation as the basis for its determination that a particular case involves extraordinary circumstances. As the House Committee on Ways and Means emphasized:

> *[T]he ["more beneficial"] provision is not intended to be so general as to be meaningless.* For example, the expenses saved because of prompt settlement of a case or the certainty of prompt relief may make settlement more beneficial than continuation of the investigation. However, *every suspension of an investigation results in prompt, certain relief and reduced expenses. The Committee does not intend that for this reason every agreement be deemed more beneficial to domestic industry.*

H.R. Rep. No. 96–317 at 65 (emphasis supplied) (concerning suspension of antidumping investigations); *see also id.* at 54 (discussion of "beneficiality" requirement in context of suspension of antidumping investigations applies with equal force to countervailing duty investigations).[42]

The Brazilian Exporters place great emphasis on the Agreement's quota, which (since October 1, 1999) has limited exports to the United States to 295,000 metric tons per year. *See* Agreement, Part IV, 64 Fed. Reg. at 38,798. They first contend that the quota caps Brazilian steel exports at "a significant reduction in tonnage" below 1997 and 1998 levels. Defendant-Intervenors' Memo at 12–13. The Domestic Producers

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[42] The Domestic Producers argue that, here, there were no benefits from "early settlement," because the Agreement was concluded on the statutory deadline for Commerce's issuance of the final countervailing duty determination. The Domestic Producers assert that, by then, they "had already incurred the burden of fully litigating the case," so that there were no "expenses saved because of prompt settlement." Indeed, the Domestic Producers maintain that "[r]elief under the Agreement was no more 'prompt' than relief resulting from entry of an order." Plaintiffs' Memo at 30–31 (footnotes omitted).

The Government and the Brazilian Exporters give these arguments short shrift, emphasizing that Commerce did not rely on "early settlement" as a benefit of the Agreement. Defendant's Memo at 31; Defendant-Intervenors' Memo at 19–20. But the Domestic Producers posit that the legislative history suggests that a suspension agreement *must* expedite relief to the domestic industry. *See* Plaintiffs' Memo at 30 n. 75 (*quoting* statement of Congressman Shannon at 125 Cong. Rec. 17,862- 63 (1979)). And, indeed, Commerce itself recognized that much of the value of suspension agreements lies in their *timing*, when it revised its own regulations to significantly advance the deadlines for initialing and signing such agreements. *See generally* n.24, *supra*. In mandating that any potential suspension agreement be considered immediately following Commerce's issuance of its preliminary determination, Commerce recognized that the accelerated timeline would save time and money by "reduc[ing] burdens on all parties by eliminating the need to file case briefs, rebuttal briefs, and * * * participate in a hearing, if a suspension agreement is accepted." 61 Fed. Reg. at 7315. On the other hand, the legislative history indicates that Congress contemplated that, in appropriate cases, Commerce could accept a suspension agreement as late as its final determination. *See, e.g.*, S. Rep. No. 96–249 at 15 (suspension to occur "prior to a final determination by the administering authority").

counter that "unfairly traded imports were surging in 1997 and 1998," and that—using 1995 and 1996 as the baseline instead—the quota fixed in the Agreement "exceeds the historical norm by a whopping 53 percent." Reply Memo at 10.

Similarly, the Brazilian Exporters note that a countervailing duty order places no limit on import volumes, so that importers would be free to import as much Brazilian steel as they wish so long as they paid the requisite duties. Defendant-Intervenors' Memo at 13–14; *see also* Tr. at 63 (counsel for Government argues that Agreement "limit[s] market share in a way that a CVD order never could"). However, as the Domestic Producers point out, an order would subject every single ton of subsidized steel to the payment of countervailing duties, while the Agreement permits 295,000 metric tons (325,248 short tons) of subsidized steel to enter the United States every year free of such duties. Reply Memo at 11.

Finally, the Brazilian Exporters claim that the Agreement's quota imposes an "absolute and consistent cap" on the quantity of Brazilian steel that may enter the United States in any given year, while—under an order—the countervailable subsidies would be amortized over time, so that countervailing duties would decline and it would become increasingly easier for Brazilian producers to export to the United States. Defendant-Intervenors' Memo at 14. But the Domestic Producers dispute that alleged benefit as well, arguing, first, that—under an order—the subsidy rate could be reduced only if an administrative review were conducted; and, second, if such a review were conducted, the subsidy rate would in fact *increase* to the extent that new domestic or other subsidies were found. Reply Memo at 11–12.

The Brazilian Exporters also highlight as a benefit of the Agreement the Brazilian Government's "agreement not to bestow * * * export and import substitution subsidies, and to notify the Commerce Department any time it has reason to believe that such subsidies exist."[43] Defendant-Intervenors' Memo at 16 (*referring to* Agreement, Part III.C, 64 Fed. Reg. at 38,798). According to the Brazilian Exporters, that undertaking "avoids the costly and time-consuming mechanism of administrative reviews to determine the existence of future countervailable benefits." *Id.* The Domestic Producers retort that export and import substitution subsidies were not the cause of the injury at issue in the investigation (and are therefore irrelevant), and that the Agreement's related notification requirements simply restate certain of the Brazilian Government's pre-existing WTO obligations. Reply Memo at 12–13. Moreover, the Domestic Producers note, Commerce would still have to conduct an administrative review to determine the increased subsidy rate. *Id.* at 13.

As discussed in section IV.A above, this case is being remanded to enable Commerce to reconsider its Suspension Determination, giving due consideration to petitioners' comments and undertaking any further

[43] Although the Public Interest Memorandum cites the Agreement's provision on export and import substitution subsidies as providing "greater certainty" for all parties, the Government contends that the provision is basically superfluous. According to the Government, Commerce's "beneficiality" determination could be sustained on the basis of the Agreement's quota alone. *See* Tr. at 58–59.

consultation that may be appropriate. On remand, Commerce will have the opportunity at the administrative level to explain its interpretation of the "more beneficial" requirement, in light of the statute's legislative history and Commerce's own prior practice. More importantly, Commerce will have the opportunity to detail, in light of petitioners' comments (and with the benefit of their amplification before the Court), precisely why the Agreement is more beneficial to the domestic industry than a countervailing duty order—even though at least a substantial segment of the domestic industry believes that it is not.

2. Whether the Investigation Was Complex

Even if Commerce properly concluded that the Agreement is more beneficial to the domestic industry than continuation of the investigation, that would not suffice to constitute the "extraordinary circumstances" required to justify a subsection (c) agreement. Commerce must also determine that the investigation is "complex." 19 U.S.C. § 1671c(c)(4). The Domestic Producers vigorously contest that determination in this case.

For purposes of the statute, an investigation is deemed "complex" if "(i) there are a large number of alleged countervailable subsidy practices and the practices are complicated, (ii) the issues raised are novel, or (iii) the number of exporters involved is large." 19 U.S.C. § 1671c(c)(4)(B). Commerce apparently relied on the first two criteria in determining that the investigation here at issue was complex. *See* Extraordinary Circumstances Memo.

(i) Whether There Were A Large Number of Complicated Subsidy Practices At Issue

As to criterion (i)—the number and complexity of the subsidy practices alleged—Commerce's Extraordinary Circumstances Memorandum stated that the investigation here involved "four programs" and "complex issues concerning affiliation and the privatization of three separate companies." But the parties cannot agree even as to *number* of subsidy "practices" at issue—much less whether or not that number is "large."[44]

The Domestic Producers contend that the number of practices is actually *lower* than Commerce suggests. Specifically, the Domestic Producers maintain that the four "programs" actually constitute only two "practices": equity infusions and tax deferrals. Plaintiffs' Memo at 34–36; Reply Memo at 16. In any event, they argue—whether the number of practices is two or four—neither number is a "large number"

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[44] As discussed in *Bethlehem Steel*, Slip Op. 01–65 at 38–39, "large" is a relative term. Commerce stated that the investigation at issue there "involve[d] a large number of transactions and multiple adjustments." *Id.* at 38 (citations omitted). In contrast, Commerce here stated only that the investigation involved "four programs" and "complex issues." *See* Extraordinary Circumstances Memo. Only after the fact—in the Government's brief—are those statements synthesized into a conclusion that the investigation at issue in this case involved a "large number" of "subsidy practices." *See* Defendant's Memo at 32–33.

In support of their argument that the investigation here did *not* involve a "large number" of "subsidy practices," the Domestic Producers contrast it with other recent countervailing duty investigations. Plaintiffs' Memo at 36 n.89. In particular, they note that Certain Cut-to-Length Carbon-Quality Steel Plate from Italy "listed 36 'programs' of all types and varieties." *See id.*, *citing* Certain Cut-to-Length Carbon-Quality Steel Plate from Italy, 64 Fed. Reg. 73,277 (1999).

within the meaning of the statute. Plaintiffs' Memo at 36; Reply Memo at 16. The Brazilian Exporters, in turn, assert that Commerce significantly *understated* the number of programs at issue in the investigation. Defendant-Intervenors' Memo at 23–31. And the Government claims that sometimes a single "program" may involve numerous "subsidy practices," which they assert was the fact in this case. Defendant's Memo at 34.

The Domestic Producers condemn as pure *post hoc* rationalization the Government's efforts to treat as a "multitude" of "practices" the four "programs" mentioned in the Extraordinary Circumstances Memorandum. Reply Memo at 16–17. As the Domestic Producers note, Commerce justified its "extraordinary circumstances" determination on the basis of four "programs," and said nothing about any of those programs involving more than one "practice." *Id.*[45]

Unless the Extraordinary Circumstances Memorandum's reference to "programs" is read as a synonym for "practices," Commerce made no determination as to the number of practices at issue in the investigation and therefore could not rely on the first criterion for finding "extraordinary circumstances" in this case. But there is no need to reach that issue here. For the reasons set forth in section IV.A above, this case is being remanded. On remand, Commerce will have the opportunity to articulate its interpretation of the statute's reference to a "large number," as well as its definition of a "practice" (as the term is used in the statute), with the benefit of petitioners' comments (as amplified in their briefs before the Court).

Even if the investigation in fact involved a large number of alleged subsidy practices, criterion (i) would be satisfied only if those practices were also "complicated." 19 U.S.C. § 1671c(c)(4)(B)(i). In its Extraordinary Circumstances Memorandum, Commerce stated that the investigation here involved "complex issues concerning affiliation and the privatization of three separate companies." The Government's brief seeks to amplify that statement, by explaining that the respondents were part of a complex web of intercorporate relationships. Defendant's Memo at 35. The Government further notes that the respondents were privatized, and claims that "[t]he unique transactions that gave rise to [the] various changes in ownership were exceedingly complex." *Id.* The Domestic Producers counter that Commerce was already familiar with many of the relevant facts from prior investigations, greatly simplifying the review of respondents' affiliations and privatizations.[46] Reply

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[45] The Domestic Producers further argue that the Government's interpretation conflicts with the plain language of the statute. According to the Domestic Producers, the Government effectively renders the word "practices" mere surplusage, by reading the statute to require not a "large number of * * * subsidy *practices*," but only a "large number of * * * *subsidies*." Reply Memo at 18 (first emphasis in the original; second emphasis supplied).

[46] The Brazilian Exporters argue that the subsidy practices were complicated because Commerce had to determine "whether the infusions should be maintained in Brazilian currency and corrected using inflation indices, or whether the historical value of each infusion should be converted into dollars based on an exchange rate during the month of the infusion"; whether to dollarize using month-end or monthly average exchange rates; and the amortization period for the equity infusions. Defendant-Intervenors' Memo at 31–32. But, according to the Domestic Producers, Commerce resolved each of those issues in a 1992–93 investigation of Brazilian steel, and here simply followed its practice from that earlier investigation. Reply Memo at 23–24.

Memo at 22. Moreover, they note, Commerce largely resolved the affiliation and privatization issues in the Preliminary Determination. Thus, suspending the investigation did not spare Commerce from the need to address those allegedly "complicated" issues. *Id.*[47]

Because the case is being remanded, there is no need to determine whether—on this record—Commerce properly determined that the subsidy practices at issue were complicated. On remand, Commerce will have the opportunity to revisit the issue, with the benefit of petitioners' comments (as amplified here), and to articulate clearly the basis for whatever determination it may make.

(ii) Whether the Issues Raised Were Novel

The Government argues in the alternative that—even if the investigation did not involve a large number of complicated subsidy practices—Commerce's determination that the investigation was "complex" nevertheless must be sustained because Commerce properly found that it involved issues that were "novel." *See generally* Defendant's Memo at 37–40; 19 U.S.C. § 1671c(c)(4)(B)(ii). Specifically, the Government relies on Commerce's statement in the Extraordinary Circumstances Memorandum that the investigation "involve[d] complex issues concerning affiliation and the privatization of three separate companies."

The Domestic Producers maintain that this was a run-of-the-mill countervailing duty investigation, and vigorously dispute the notion that any "novel" issues were presented. They emphasize that Commerce had addressed the *issues* raised by affiliation in several prior investigations and, indeed, that it had previously investigated in other cases many of the relevant *facts* concerning the very affiliations involved in this case. Plaintiffs' Memo at 39–40.

The Government dismisses the prior antidumping cases as irrelevant, arguing that "affiliation" in an antidumping duty context differs from "affiliation" in a countervailing duty context. Defendant's Memo at 38–39. The Government asserts that the support for the Domestic Producers' argument is thus reduced to one prior countervailing duty case where Commerce addressed affiliation; but the Government seeks to distinguish even that case because it didn't involve any of the companies in this case, or the types of relationships at issue here. *Id.*[48]

The Domestic Producers are equally adamant that the investigation raised no novel issues concerning privatization. They point to the numerous opinions on the subject rendered in recent years by the U.S. Court of Appeals for the Federal Circuit, and note that Commerce itself

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[47] In its brief, the Government singles out the use of "privatization currencies" in particular as an issue that Commerce had never seen before. Defendant's Memo at 40. But the Domestic Producers are dismissive. According to the Domestic Producers, the issue of privatization currencies presented only two questions: First, whether the privatization currencies should be valued at their market values (assertedly an easy decision, in light of Commerce's stated "preference to use market values in calculations where possible"); and, second, whether market values were available. Reply Memo at 23. Commerce determined that they were not, and therefore used "facts available." But the Domestic Producers argue that that fact alone did not make the use of privatization currencies "complicated." *Id.*

[48] Both the Government and the Brazilian Exporters focus, in particular, on assertedly unique aspects of the collapsing analysis in the investigation in this case. Defendant-Intervenors' Memo at 38; Defendant's Memo at 38 n.24. As the Government puts it, "even if it has addressed affiliation and collapsing issues in the past, the unique facts before it in any new case require Commerce to visit the issue anew." Defendant's Memo at 38 n.24.

has devoted much time and effort to the development and defense of its privatization methodology. Plaintiffs' Memo at 40–41. While they concede that the subject has been contentious, the Domestic Producers observe that the statutory test for complexity is novelty, not controversy. *Id.* at 41. The Domestic Producers further note that Commerce even had familiarity with Brazil's privatization program from a prior investigation and, in fact, drew on that experience in this investigation. *Id.*

The Government emphasizes that Commerce's prior investigation involving Brazil's privatization program was limited to the partial privatization of USIMINAS. Later partial privatizations of USIMINAS had to be addressed in this investigation, as did the privatizations of the other two respondents, COSIPA and CSN. Defendant's Memo at 39–40.

Moreover, according to the Government and the Brazilian Exporters, there were many novel aspects of the privatizations at issue in this case. For example, both the Government and the Brazilian Exporters emphasize that Commerce here considered for the first time the use of "privatization currencies." Defendant's Memo at 40; Defendant-Intervenors' Memo at 36. The Brazilian Exporters further note, *inter alia*, that this investigation was Commerce's first examination of the impact of pre-privatization infusions on the actual terms and conditions of the privatization transactions; that the Brazilian Government's role as a purchaser presented novel issues; and that novel issues arose from the fact that the companies were only partially privatized in the initial transactions, with most or all of the remaining government shares sold in subsequent privatization auctions. Defendant-Intervenors' Memo at 36–37. The Brazilian Exporters also point to the fact that this investigation was the first countervailing duty investigation involving privatized companies in Brazil under the Uruguay Round legislation (which included a new "change in ownership" provision). *Id.* at 37. Finally, the Brazilian Exporters assert that, because they had never before been examined by Commerce, "nearly every aspect" of the tax deferral programs at issue in the investigation presented novel issues. *Id.* at 37–38.

As the Domestic Producers note, however, the statutory criterion that an issue be "novel" requires more than that the issue differ *slightly* from similar issues that Commerce has confronted in the past. There must be some fairly *fundamental* difference.[49] Plaintiffs' Memo at 37–38; Reply Memo at 25–26. Moreover, it is the *issue* that must be novel. The requirements of the statute are not met simply because a particular inves-

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[49] To support their argument, the Domestic Producers point to the definitions in a sampling of oft-cited references. *See* Plaintiffs' Memo at 37–38 *and* authorities cited there. The common denominators of those—and other—dictionary definitions of "novel" are terms such as "new," "striking," "strange," "unusual," and "not resembling something formerly known." For example, *Webster's Ninth New Collegiate Dictionary* defines "novel" as "new and not resembling something formerly known or used," *id.* at 809 (1990), while the definition in *Webster's Third New International Dictionary* is "not resembling something formerly known: having no precedent: new" and "original or striking in conception or style: strange, unusual." *Id.* at 1546 (1981). The entry in *The American Heritage College Dictionary* defines "novel" as "[s]trikingly new, unusual or different." *Id.* at 934 (3d ed. 1997). The Domestic Producers also rely on the definition of "novelty"—the nominal form of the adjective "novel"—in *Black's Law Dictionary*: "An invention or discovery is new or possesses requisite element of 'novelty' if it involves the presence of some new element, or the new position of an old element in combination, different from anything found in any prior structure * * *. Novelty, in respect to design terminology, is present when the average observer takes the new design for different and not just a modified already existing design." *Black's Law Dictionary* 1064 (6th ed. 1990).

tigation involves different facts than prior investigations.[50] *Id. See Bethlehem Steel,* Slip Op. 01–65 at 39. Every investigation presents case-specific facts. Thus, for example, while the tax deferral programs investigated in this case involved new facts, they did not necessarily involve new *issues* within the meaning of the statute; Commerce has examined such issues before. *See generally* Reply Memo at 28.

Because the case is being remanded, there is no need to reach the question whether—on this record—Commerce properly determined that the investigation raised novel issues. On remand, Commerce will have the opportunity at the administrative level to explain its interpretation of the statute's "novelty" requirement and, with the benefit of petitioners' comments (as amplified before the Court), to reconsider the application of that provision to the investigation here, and to articulate clearly the basis for whatever determination it may make.

D. The Public Interest

In addition to satisfying all other applicable requirements, a suspension agreement must serve the public interest as well. 19 U.S.C. § 1671c(d)(1).[51] The statute requires that, in evaluating the public interest vis-a-vis a quantitative restriction agreement (such as the one at issue here), Commerce is to take into account—"in addition to such other factors as are considered necessary or appropriate"—those factors "set forth in subsection (a)(2)(B)(i), (ii), and (iii) of [§ 1671c] * * *, after consulting with the appropriate consuming industries, producers and workers" in the affected domestic industry producing like merchandise, including producers and workers not party to the investigation. *Id.*

The referenced subsections of § 1671c(a)(2)(B) in turn require that, in evaluating the public interest, Commerce consider:

> (i) whether, based upon the relative impact on consumer prices and the availability of supplies of the merchandise, an agreement would have a greater adverse impact on United States consumers than the imposition of countervailing duties;
>
> (ii) the relative impact on the international economic interests of the United States; and

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[50] The Domestic Producers specifically reject the Brazilian Exporters' claim that the investigation presented novel issues because the initial privatizations were only partial. According to the Domestic Producers, there was no controversy over how to account for partial privatizations; all relevant issues had been resolved in prior cases involving partial privatizations. Reply Memo at 27. They also dismiss the Brazilian Exporters' reliance on the Uruguay Round legislation, noting that—prior to the Final Determination here—the Court of International Trade had already held that the legislation did not require any modifications in Commerce's treatment of changes of ownership; thus, the Domestic Producers reason, Commerce could not have considered the legislation to present "novel" issues at the time the Final Determination was made. *Id.* at 27–28. In any event, as the Domestic Producers note, the Extraordinary Circumstances Memorandum did not cite the Uruguay Round legislation as a source of "novel" issues. Reply Memo at 28 n.90. And it is well-settled law that "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *See Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Commerce's "novelty" determination therefore could not be sustained on the basis of any rationale on which Commerce did not rely.

[51] Specifically, the statute precludes Commerce from suspending an investigation unless "it is satisfied that suspension * * * is in the public interest." 19 U.S.C. § 1671c(d)(1). The Government emphasizes that the Court's inquiry is essentially limited to ascertaining whether Commerce's determination is supported by substantial evidence, and argues that the statute's use of the term "satisfied" reflects Congress' intent to "confer broad discretion upon Commerce in making [its public interest] assessment." *See* Defendant's Memo at 42–43; *see also* Defendant-Intervenor's Memo at 43–44.

> (iii) the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry.

In its Public Interest Memorandum, Commerce concluded that, "*taken together*, the reasons set out below establish that the *Agreements* are in the public interest." (Emphasis supplied; referring to both the Agreement in this case as well as the suspension agreement in the related antidumping case.) According to the Government, Commerce's determination was premised on three reasons: "First, the Suspension Agreement will ensure that Brazilian hot-rolled steel is fairly traded on the U.S. market. Second, the Suspension Agreement will eliminate completely the injurious effects of such imports on the domestic industry. * * * Third, the Suspension Agreement will provide greater certainty to all parties." Defendant's Memo at 41 (footnotes omitted).

As to the first two points cited by the Government, the Public Interest Memorandum stated:

> [T]he Agreements will ensure that Brazilian hot-rolled steel is fairly traded in U.S. markets and will reduce import volumes sufficiently to eliminate completely the injurious effects of such imports on the domestic industry. Unlike the situation with AD/CVD orders, the quantitative restriction and reference price requirements imposed on imports under the Agreement will protect the domestic industry from future exchange rate-driven surges of Brazilian hot-rolled steel. Such provisions are particularly important in light of the recent financial crisis abroad and the significant fluctuation in the Brazilian real in recent periods. Thus, the Agreements will help to ensure that domestic producers will be able to compete on fair terms and make the necessary investments in new plant [sic; plants] and equipment, worker training and retraining, and research and development. This will help to increase not only the competitiveness of each producer, but also the competitiveness of the domestic market as a whole. Workers will benefit from reduced trade-related uncertainties about wages and employment, which will improve their performance and productivity.

The Domestic Producers basically contest each of those assertions.[52]

The Domestic Producers fundamentally question how permitting a substantial quantity of subsidized Brazilian steel to enter this country will ensure that it is "fairly traded in U.S. markets" and will "help to ensure that domestic producers will be able to compete on fair terms." Plaintiffs' Memo at 45–46; Public Interest Memo. They further challenge Commerce's claim that the Agreement "will help to ensure that domestic producers will be able to * * * make the necessary investments in new plant [sic; plants] and equipment, worker training and retraining, and research and development," querying "how permitting that

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[52] As discussed in section IV.C.1 above, the Government invokes the doctrine of exhaustion of administrative remedies to argue that the Domestic Producers are now barred from challenging Commerce's conclusion in the Suspension Determination that the Agreement eliminates completely the imports' injurious effect on the domestic industry because the Domestic Producers failed to petition for ITC review of that determination under 19 U.S.C. § 1671c(h)(3). *See* Defendant's Memo at 43. For the reasons stated in section IV.C.1, there is no need to address that argument here.

subsidized tonnage to continue to depress prices will help domestic producers make needed investments." Plaintiffs' Memo at 45–46.

The Government in turn contends that the Domestic Producers discount the asserted impact on fair competition of the quota established in the Agreement at issue here, combined with the "reference price" provision in the antidumping suspension agreement. Defendant's Memo at 45. *See also* Defendant-Intervenors' Memo at 44 (emphasizing tandem effect of quota and reference price provisions).[53] As discussed above in section IV.C.1, however, the Domestic Producers maintain that this Agreement must "stand or fall on its own" merits, and cannot be justified by reference to the other suspension agreement. *See* Reply Memo at 29.[54]

The Domestic Producers also attack Commerce's focus on "protect[ing] the domestic industry from future exchange rate-driven surges" of Brazilian steel. *See* Public Interest Memo. The Government asserts that it is uncontested that the Brazilian currency fluctuated during the relevant period, and that those fluctuations resulted in surges of imports into the U.S. market, adversely affecting the U.S. steel industry. Defendant's Memo at 48–49. The Government reasons that, since the competitiveness of the domestic industry is a factor to be weighed under the statute in evaluating the public interest, Commerce did not err in considering the impact of exchange rate fluctuations. *Id.*; 19 U.S.C. §§ 1671c(d)(1), 1671c(a)(2)(B)(iii).

The Domestic Producers point out, however, that the injury in a countervailing duty case is caused not by exchange rate fluctuations, but rather by subsidies. Plaintiffs' Memo at 47. Moreover, they emphasize, exchange rates for all currencies fluctuate, and thus are "part and parcel" of every countervailing duty investigation. Thus, they argue, if exchange rate fluctuations were a legitimate factor justifying a public interest determination, the public interest would always be better served by suspending an investigation—a result Congress plainly did not intend. Reply Memo at 29–30.

The Government cites as the third and final basis for Commerce's public interest determination the "greater certainty" it is said to provide to all parties—U.S. producers, U.S. consumers, and Brazilian producers. Defendant's Memo at 41; Public Interest Memo. Yet again, the

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[53] The Government also relies on both the quota provision of this Agreement and the reference price provision of the antidumping suspension agreement as support for Commerce's determination that the two suspension agreements will reduce "trade-related uncertainties." Defendant's Memo at 44–45. Commerce found that "workers will benefit from reduced trade-related uncertainties about wages and employment, which will improve their performance and productivity." Public Interest Memo. But the Domestic Producers assert that Commerce's statement "makes no sense." Plaintiffs' Memo at 45. The Domestic Producers wryly contend that the continued importation of subsidized steel "makes certain that wages and employment will continue to be suppressed," but question exactly "how that certainty will improve workers' performance and productivity." *Id.* The Government asserts that the Domestic Producers do not directly dispute Commerce's underlying premise that reduced trade-related uncertainties will benefit workers, and maintains that the mere fact that the Agreement allows imports of subsidized steel to continue does not alter the soundness of Commerce's finding. Defendant's Memo at 43–45.

[54] Like its Extraordinary Circumstances Memorandum, Commerce's Public Interest Memorandum addressed the suspensions of both the countervailing duty investigation and the antidumping investigation. For the sake of clarity, Commerce may wish to reconsider that approach on remand. *See* n.39, *supra*.

Domestic Producers dispute each and every assertion underlying Commerce's claim. *See generally* Plaintiffs' Memo at 46–48.

For example, in its Public Interest Memorandum, Commerce asserted:

> [T]he Agreements will give U.S. consumers continued access to Brazilian hot-rolled steel at a known level and provide U.S. producers a set level of relief that will remain in force over the life of the Agreements. This would not be the case under AD/CVD orders where import levels and prices could vary dramatically from period to period, depending upon a variety of factors that could affect dumping and subsidy rates found."

The Domestic Producers question "why the public interest is served by maintaining consumer access to subsidized imports." Plaintiffs' Memo at 46. As the Government notes, the statute mandates that Commerce consider whether "the agreement would have a greater adverse impact on United States consumers than the imposition of countervailing duties." Defendant's Memo at 47 (*citing* 19 U.S.C. §§ 1671c(d)(1), 1671c(a)(2)(B)(i)). But simply citing the statute does not explain how U.S. consumers in this case benefit more from the Agreement than they would from an order.

The Domestic Producers also dispute whether "a set level of relief" is better for U.S. producers than the "full relief" available under a countervailing duty order, and challenge Commerce's assertion that—under an order—import levels and prices could vary dramatically from period to period, affecting subsidy rates. Plaintiffs' Memo at 46.

The Government argues that—contrary to the Domestic Producers' claims—price relief under an order "cannot be said to be either full or set." Defendant's Memo at 47. The Government contends that the term "a set level of relief" refers to the reference price provision in the suspension agreement in the related antidumping proceeding, which precludes the Brazilian Exporters from selling below a certain price—something they would be permitted to do under an order, provided they paid the requisite duties. Defendant's Memo at 46. Again, the Domestic Producers contest Commerce's asserted right to rely on the provisions of another suspension agreement in evaluating the public interest justification for this one. *See* Plaintiffs' Memo at 48 n.121; Reply Memo at 29 n.94.

The Domestic Producers further question Commerce's claim that "import levels and prices could vary dramatically" under an order, "depending upon a variety of factors that could affect dumping and subsidy rates found." *See* Public Interest Memo. They assert that Commerce's claim of uncertainty is misleading because, under an order, the subsidy amount in future years for equity infusions is determined when Commerce initially allocates the benefit. Plaintiffs' Memo at 46. The Government observes that a fixed subsidy amount is no guarantee of certainty in future subsidy rates, because future subsidy rates can vary depending on the subsidy recipient's future sales (since a subsidy rate is

determined by dividing the allocated benefit by the firm's sales in the relevant period of review). Defendant's Memo at 47–48.

Moreover, the Government notes, the Domestic Producers' analysis appears to assume that an order would necessarily result in an increase in the U.S. price of Brazilian steel equal to the subsidy rate. But the Government postulates that, for example, a Brazilian producer or exporter could decide itself to absorb part or all of the cost of the duty. Defendant's Memo at 46–47. The Government therefore rejects the Domestic Producers' characterization of an order as affording "full relief."

The Domestic Producers note, however, that it is always the case that future subsidy rates can fluctuate depending on the amount of future sales, just as it is always the case that subsidized producers conceivably could choose to absorb countervailing duties (rather than reflect them in prices). Reply Memo at 29–30. If those facts were valid public interest justifications for suspending an investigation, the Domestic Producers reiterate, then *every* investigation could be suspended. *Id.*

The Domestic Producers mount the same attack on Commerce's finding that the Agreement "will benefit U.S. importers and consumers by eliminating the risk and uncertainty associated with contingent * * * duty liabilities." *See* Public Interest Memo. As the Domestic Producers note, retroactive duty assessments and cash deposit requirements are inherent in every countervailing duty order. Plaintiffs' Memo at 47; Reply Memo at 29–30. Accordingly, they argue, the "certainty" resulting from the elimination of contingent duty liabilities which Commerce cites as a public interest justification for suspension of this investigation applies with equal force to the suspension of every other investigation. *Id.*

Finally, noting that neither export nor import subsidies were at issue in the investigation here, the Domestic Producers challenge Commerce's reliance on the Agreement's "firm commitment" from the Brazilian Government not to provide them. Plaintiffs' Memo at 47–48 (*quoting* Public Interest Memo). Neither the Government nor the Brazilian Exporters have responded directly to the Domestic Producer's assertion that "[t]he public interest is not served by an Agreement that addresses practices not at issue while ignoring the subsidies that caused injury: equity infusions." *See* Plaintiffs' Memo at 48. *But see* n.43, *supra, citing* Tr. at 58–59 (counsel for the Government asserts that provision prohibiting import/export substitution subsidies is "additional relief," above and beyond that required by statute).

For the reasons set forth in section IV.A above, this case is being remanded to Commerce for further consideration. Accordingly, there is no need to determine whether—on this record—Commerce properly determined that the Agreement is in the public interest. On remand, Commerce will have the opportunity to explain its interpretation of the public interest requirements of the statute, to reconsider its public interest analysis in light of the petitioners' comments as amplified in their briefs before the Court, and to articulate clearly the basis for whatever

determination it may make.[55] *See generally Bethlehem Steel,* Slip Op. 01–65 at 41–42 n.38, *citing U.S. Steel Group v. United States,* ____ CIT ____, Slip Op. 00–156 at 9–10 (Nov. 21, 2000).

V. CONCLUSION

For the reasons set forth above, this case is remanded to the Department of Commerce to enable it to comply with the notice, comment and consultation requirements of the suspension agreement statute; to allow it to articulate its interpretation of the monitoring provisions of the statute; to afford it the opportunity to articulate its interpretation of certain provisions of the "extraordinary circumstances" requirement of the statute (including the "beneficiality" provision, as well the terms "large number," "subsidy practice," and "novel"); to allow it to articulate its interpretation of the public interest requirement; and to permit it to reconsider the Suspension Agreement and its underlying Suspension Determination in that light.

A separate order will be entered accordingly.

(Slip Op. 01–94)

SAVE DOMESTIC OIL, INC., PLAINTIFF *v.* UNITED STATES, DEFENDANT, AND API AD HOC FREE TRADE COMMITTEE ET ALIA, INTERVENOR-DEFENDANTS

Court No. 99–09–00558

(Dated August 6, 2001)

Wiley, Rein & Fielding (Charles Owen Verrill, Jr. and *Timothy C. Brightbill)* for the plaintiff.

Stuart E. Schiffer, Acting Assistant Attorney General; *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(A. David Lafer* and *Lucius B. Lau);* and Office of Chief Counsel for Import Administration, U.S. Department of Commerce *(Robert J. Heilferty),* of counsel, for the defendant.

Dewey Ballantine LLP (Harry L. Clark, Michael H. Stein, Bradford L. Ward and *John W. Bohn)* for intervenor-defendant API Ad Hoc Free Trade Committee.

White & Case (Carolyn B. Lamm, Adams C. Lee and *David L. Elmont)* for intervenor-defendant Saudi Arabian Oil Company.

Shearman & Sterling (Thomas B. Wilner, Jeffrey M. Winton and *Jeronimo Gomez del Campo)* for intervenor-defendants Petroleos de Venezuela, S.A. and CITGO Petroleum Corporation.

O'Melveny & Myers LLP (Gary N. Horlick and *Michael A. Meyer)* for intervenor-defendants Petróleos Mexicanos, P.M.I. Comercio Internacional S.A. de C.V., and PEMEX Exploración y Producción.

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[55] The statute requires, for example, that Commerce's public interest analysis consider "the relative impact on the international economic interests of the United States" (19 U.S.C. § 1671c(a)(2)(B)(ii)). However, that factor does not appear to be addressed in Commerce's Public Interest Memorandum (at least not expressly)—a potential concern (in varying degrees) as to other public interest factors as well. *See* Public Interest Memo.

Commerce's rationale must be articulated with sufficient clarity so that the Court can verify that Commerce took into account all relevant public interest factors under the statute, and "satisfy itself that the agency exercised a reasoned discretion, with reasons that do not deviate from or ignore the ascertainable legislative intent." *See Greater Boston Television Corp. v. Federal Communication Comm'n,* 444 F.2d 841, 850 (D.C. Cir. 1971).

King & Spalding (Joseph W. Dorn and *Duane W. Layton)* for intervenor-defendant Texaco Inc.

Barnes, Richardson & Colburn (Robert E. Burke, Brian F. Walsh and *Robert F. Seely)* for intervenor-defendant BP Amoco.

MEMORANDUM AND ORDER

AQUILINO, *Judge:* On November 27, 2000, this court, in denying defendant's motion(s) for leave to appeal from its interlocutory order of remand to the International Trade Administration, U.S. Department of Commerce ("ITA"), per slip opinion 00–158, was

> unable to conclude that the defendant [wa]s attempting to proceed in good faith as opposed to in further delay of final determination of plaintiff's prayer for relief if not in contempt.

24 CIT ___, ___, 122 F.Supp.2d 1375, 1381. Indeed, on August 3, 2001, the defendant served and filed a Second Motion for Extension of Time in which The Department of Commerce May Respond to the Court's Order of September 19, 2000, appended to which is an order of the U.S. Court of Appeals for the Federal Circuit dated July 31, 2001 and holding that the attempted appeal and concomitant motion for a stay of this court's order by the defendant, as well as by intervenor foreign and multinational oil companies, was baseless.

The interlocutory order in question issued pursuant to slip opinion 00–120, 24 CIT ___, 116 F.Supp.2d 1324 (2000), familiarity with which is presumed herein. It stated:

> This case is hereby remanded to Commerce for contemplation of commencement of a preliminary investigation by its ITA (and referral for such an investigation by the [International Trade Commission] ITC) in accordance with law * * *. The defendant may have 60 days from the date hereof for this purpose. To the extent, in the exercise of its sound discretion during that time, the agency determines to reconsider its analysis of any of the threshold issues raised by the petition, including the nature of SDO's domestic product *vis-à-vis* that of other domestic producers and support for, and opposition to, the petition on the part of domestic producers and workers, the ITA may call upon the interested parties to supplement the record, and also upon the U.S. Departments of Labor and of Energy for relevant, publicly-available data not yet part of the record. If the stated opposition of the API Ad Hoc Free Trade Committee is still sought to be taken into account, the agency is hereby directed to consider the facts and circumstances of the business of each Committee company, standing on its own, including most necessarily that particular company's imports of crude petroleum oil from Iraq, México, Saudi Arabia or Venezuela.
>
> If the result of this remand is not initiation of preliminary investigation(s) by the ITA (and the ITC), the written reasons therefor are to be filed with the court on or before the close of the aforesaid 60-day period, whereupon the parties hereto may have 30 days to serve and file comments thereon, with any replies thereto due within 15 days thereafter.

24 CIT at ___, 116 F.Supp. at 1343. In other words, the initial deadline set by slip opinion 00–120 was November 20, 2000.

The defendant did not comply with the foregoing order, nor has it yet done so. Rather, its current motion (for further delay—until August 10, 2001), represents that,

> [a]t this time, an extension * * * is warranted to allow the current Assistant Secretary for Import Administration an opportunity to adequately and faithfully respond to the Court's remand order. During the original 60-day period in which the Court instructed Commerce to conduct its remand, that agency's staff undertook the analysis contemplated in this Court's opinion and order. However, the current Assistant Secretary was only nominated in February 2001 and confirmed in May 2001. Thus, he has not had an opportunity to review this Court's opinion and the staff's analysis in order to make an appropriate determination. A brief extension of time of seven days would allow the Assistant Secretary sufficient time to render a reasoned and thoughtful decision.

If this representation genuinely reflects a change in the administering authority within the meaning of the Trade Agreements Act of 1979, as amended, in the aftermath of the 2000 presidential election, defendant's motion can be granted. However, neither this motion, nor anything else on the record of this case to date, dispels the above-quoted inability of the court to conclude that the defendant has not been dilatory and contemptuous. Indeed, this court has long warned the ITA and its counsel that they are not at liberty to ignore a remand order, "whether or not subject to further judicial review." *Smith Corona Corp. v. United States,* 13 CIT 96, 100, 706 F.Supp. 908, 912 (1989), *aff'd in pertinent part,* 915 F.2d 683 (Fed.Cir. 1990).

Ergo, while the defendant may have until the close of business on Friday, August 10, 2001, within which to respond to the above-quoted, outstanding order of the court dated September 19, 2000[1], the defendant is also hereby directed to appear before the undersigned in courtroom 3 at 11 a.m. on that day to show cause, if there be any, why it should not be formally cited and sanctioned for contempt of court, commencing on or about November 20, 2000.

The Clerk forthwith shall enter on the docket this memorandum and order and notify all parties to this case thereof before the close of business today.

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[1] The amount of time for comments on whatever the defendant deigns to submit, and for replies thereto, shall remain as set forth in that order.

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